CASES IN EQUITY

ARGUED AND DETERMINED IN THE

SUPREME COURT

OF

NORTH CAROLINA

AT RALEIGH

DECEMBER TERM, 1860

A. E. MYERS v. WILLIAM DANIELS.*

1. Where a cause was referred to arbitrators, no pleas having been entered, it was *Held*, that the reference was nothing more than a parol reference, and that the presiding judge had no power to have it stricken out.
2. Where the defendant, in his answer, admitted that a cause was referred (no pleas having been entered), and that the reference was stricken out without notice to the other party, and the cause was submitted to a jury, and a judgment obtained against him without his knowledge, the court refused to dissolve an injunction granted to restrain the collection of the same.

APPEAL from an interlocutory order, made at Spring Term, 1860, of WILKES, *Osborne, J.*

This was a bill filed by A. E. Myers to vacate and set aside a (2) judgment rendered at Fall Term, 1859, of Iredell Superior Court, and to enjoin the collection of the same. Plaintiff alleges in his bill that in 1856 he sold to the defendant a valuable horse; that shortly afterwards said defendant alleged that plaintiff had practiced a fraud upon him in the trade, and brought suit against him to Fall Term, 1857, of Iredell Superior Court; that plaintiff and defendant, before return term of said writ, agreed to refer the case to Jacob Fraley, Steptoe Bennet, Williamson Campbell and Davidson Sharpe, with leave to choose an umpire; that at Fall Term, 1857, of said Court, one of defendants's attorneys entered the reference on the docket, and shortly afterwards the referees met, and after selecting an umpire, decided the cause in favor of plaintiff Myers, and filed their award in the office of

*This cause was decided at Morganton, but was inadvertently taken away, so that the Reporter could not get it.

the Clerk of said Court, in which they used the following language: "We find all issues in favor of the defendant," the present plaintiff. Plaintiff alleges further that it was distinctly agreed between them that the cause was "taken out of Court," and the decision of said referees was to be final. Plaintiff further alleges, that when said referees decided the cause in his favor, defendant Daniels expressed himself satisfied, and he distinctly understood that the suit was at an end; that he, Myers, shortly afterwards removed to Wilkes County, where he still resides. Plaintiff further states, in his bill, that at the Spring Term, 1858, of said Court, defendant's counsel moved to set aside the award, because there was no "issues to be found," no pleas having been entered in the cause, and the award was stricken out; that at Fall Term, 1858, the reference was stricken out, on motion of the counsel of said Daniels, without any notice being given to plaintiff, Myers; that at Spring Term, 1859, a judgment by default and enquiry was entered against him, and at Fall Term, 1859, a jury was empanelled and a verdict rendered against him, in favor of Daniels, for $296, and execution was issued to collect the same. Plaintiff charges that defendant conducted these proceedings fraudulently, and that he knew nothing of the same
(3) until the Sheriff applied to him for the money due on said execution.

Defendant admits the reference as set forth in the bill; admits that the referees met, examined the witnesses, and decided the cause in favor of Myers, but he denies that he considered their decision final; he admits that the reference was stricken out without any notice being given to plaintiff, Myers, and that the award was set aside without the knowledge of Myers, and that Myers never employed counsel in the cause. On the coming in of the answer, the defendant's counsel moved to dissolve the injunction.

The defendant's counsel insisted that the Court of Equity had no jurisdiction of this cause, for the reason that the judgment by default was an office judgment, and if improperly obtained, was subject to revision at a subsequent term on motion; that the award was informal, and was properly set aside by the presiding Judge; that defendant, Daniels, was not bound to give the plaintiff, Myers, notice of the proceeding in this cause, as it was his duty to employ counsel.

Plaintiff's counsel insisted that although the judgment by default and enquiry was an office judgment, the final judgment rendered by the Court, on the finding of the jury duly empanelled, under the instructions of the Court, was a regular judgment, and could not be set aside on motion; that no award could be a rule of Court, unless the reference was made after the cause was put at issue; that our Courts can not enforce the performance of an award by execution, except in those cases

where, at common law, awards were enforced by attachments for contempt; that at common law an attachment was only allowed where the cause was referred in the *nisi prius* Courts (the pleas having been entered in the Courts of Westminster). Plaintiff's counsel insisted that the Court had no control of the reference; and that the decision of the referees was final; that the defendant's answer admitted facts showing that unfair means were resorted to, to obtain the judgment in the cause.

The Court refused to dissolve the injunction, but ordered it to be continued to the hearing; from which the defendant appealed. (4)

Barber, for the plaintiff.
Boyden, for the defendant.

MANLY, J. This is an appeal from an interlocutory order continuing an injunction until the hearing.

We have considered the bill and answer, and concur with his Honor, the Judge below, in the propriety of the interlocutory order made by him. The equity of the bill, which has not been met by the answer, rests upon *Simpson v. McBee,* 14 N. C., 521, and the principles laid down in Billings on Awards, 230, 231. Without deciding at this stage of the case upon the merits of this equity, we think there is enough not met by the answer to send the case to a final hearing, with the injunction in the meantime continued.

PER CURIAM. Affirmed.

(5)

JONATHAN WORTH, Adm'r, v. ALEXANDER GRAY and others.

1. The orders and decrees of a court of equity are not necessarily absolute, but may be moulded and shaped to meet the exigence of each particular case.
2. Where a bill was demurred to, which seemed to be deficient in equity, yet, as there were facts and circumstances incident to the matter disclosed, which would have an important bearing on the case, some of which were not set out at all, and others but vaguely, and the amount involved was large, the court, without costs and without prejudice to the defendants equity, overruled the demurrer in order that the plaintiff's bill might be amended.
3. Where a husband having a right to receive satisfaction for or release the equity of his wife, permitted a long time to elapse without bringing suit, during which time his adversary was in the open use of the property, claiming it as his own, it was *Held,* that a presumption of abandonment, release or satisfaction arose against the equity, which would be fatal, unless the delay was accounted for.
4. Whether ignorance of the claimant's right is sufficient to repel the presumption arising from the lapse of time—*Quære?*
5. Whether where a bill by way of anticipation sets forth facts to repel the presumption of satisfaction, release or abandonment, which avers that in fact there was none, the defendant pleads the statute of presumptions, it is necessary to support such plea by an answer to the plaintiff's allegations—*Quære?*

CAUSE transmitted from the Court of Equity of RANDOLPH.

The bill alleges that on 13 August, 1809, in contemplation of a marriage, then about to be solemnized between the defendant Alexander Gray and Nancy Parke, widow, articles of agreement, of three parts, were made and entered into between the said Alexander Gray and the said Nancy Parke, and one Solomon K. Goodman, therein named as trustee, the material portion of which is as follows:

"That whereas, a marriage is shortly intended to be solemnized between the said Alexander Gray and Nancy Parke, with whom the said Alexander Gray is to have and receive all such property, both real and personal, as the said Nancy is now possessed of, or may hereafter be possessed of, in consequence of any lawsuit which now is or hereafter may be brought for the recovery of any moneys or property to which she is entitled; it is, therefore, covenanted and agreed between the said parties to these presents in manner and form following: First, that the said Alexander Gray, for himself, his heirs, executors or administrators, doth covenant and agree with the said Nancy Parke and Solomon K. Goodman, their heirs and assigns, that they, the said Alexander Gray and Nancy Parke, his intended wife, in case the intended marriage be solemnized, by some good and sufficient conveyance in law, shall settle and assure all such property, whether real or personal, whereof (6) she, the said Nancy, is seized as aforesaid, to the use and behoof of her, the said Nancy, and her friend and agent, Solomon K. Goodman, for her use and benefit during her natural life, and the said Alexander Gray doth, by these presents, covenant and agree that Solomon K. Goodman, the agent or trustee aforesaid, shall have full power and authority, by the advice and counsel of the said Nancy, to prevent the said property from being sold or wasted, and doth further covenant and agree that the said Nancy Parke, his intended wife, shall have full power and authority over the said property, and may, at any time, give or convey any part of the same to her relations, and shall have full power by these presents, by will or otherwise, to dispose of the whole of the same to her friends and relations at her death: Provided, nevertheless, that if the said Nancy shall have children by the said Alexander Gray, she shall not dispose of the said property so as materially to injure them; and in case the said Alexander Gray shall first die, it is on his part, by these presents, covenanted and agreed that the said Nancy, his intended wife, shall hold by herself and the authority of her said agent all such real or personal property as she now is entitled to, and in case the said Alexander Gray should depart intestate, that the said Nancy shall, in addition to her own estate, have, hold, possess and enjoy a distributive share of him, the said Alexander Gray."

That the whole of these articles are in the handwriting of General

Gray, except the signature of Mrs. Gray and the trustee, and one Harry Burrow, the subscribing witness; that Goodman was the brother-in-law of Mrs. Gray, and Burrow, the witness, her brother; that said Goodman retained the said marriage articles in his possession until he removed to the State of Tennessee about thirty years ago, when he committed them to the safe keeping of one Kennedy, who, after holding them for many years, transmitted them to Stephen Moore, who delivered them to the plaintiff, who caused them to be duly proved and registered in the county of Randolph.

That the said intended marriage was solemnized, and in 1810 a child was born of the marriage, to wit, Mary, who subsequently, at about the age of twenty, was married to the said Stephen Moore, (7) of Hillsboro; that in 1852 or 1853 she, with her husband, removed to the State of Arkansas, and there died, and at May Term, 1860, of Randolph County Court, the plaintiff, Worth, took out letters of administration on her estate.

That General Gray never made any deed or assurance as stipulated in the marriage articles, and that his wife, the said Nancy, died in 1818 or 1819, without making any will, and without ever having disposed of any of the property owned by her at her marriage; that General Gray married a second wife some five years afterwards, by whom he had several children, whose names are set out in the bill, and who are made defendants. The bill sets out the nature and quality of the property owned by the said Nancy, and which he was possessed of by virtue of his marriage, and the articles aforesaid, consisting of land and a large number of valuable slaves; that Moore and his wife sold to Gray the reversion in the land after the expiration of his life estate. The plaintiff, by his bill, insists that the effect of these articles was to limit the use and benefit of the property to the said Alexander Gray, during the joint lives of him and his wife, and after the death of the latter, then to their daughter, the said Mary, absolutely, and that at any time after the birth of the said Mary, she (the mother) might have insisted on conveyances to that effect, saving the power of a disposition to a moderate amount in favor of her friends and relations during her (the mother's) life, and that the plaintiff, as the administrator of the said Mary, is entitled to an account of all the personal estate upon that basis.

The bill sets out that the personal property aforesaid was taken into possession by the said Gray, and ever since has been treated, used and enjoyed as his own absolute property, or has been disposed of for his own benefit; that of the slaves, several were given to his children, who are made defendants, and are called on to account for the same; that within a year or two before filing the bill, the said Stephen (8) Moore called his attention to the said marriage articles; he

seemed to have forgotten them, and at first denied their existence, but when produced, he admitted their genuineness, and stated that it had always been his intention that the property of Mary's mother should be given to her (Mary) and her children; and at one time it was agreed between the said Moore and the said Gray that the matter should be referred to the arbitrament of counsel, or to compromise the same themselves; but on the next day Gray expressed a desire that the matter might be settled by a bill in equity, and refused to account in any other manner.

The prayer of the bill is for an account of the slaves and their hires and profits.

The defendants demurred; there was a joinder in demurrer, and the cause being set down for argument, was sent to this Court.

Graham, for the plaintiff.
Fowle, Morehead and *Kittrell,* for the defendants.

PEARSON, C. J. The demurrer raises two questions:

1. The construction of the marriage articles.

2. The effect of the lapse of time during which the defendant Gray has been in possession, enjoying the property as absolute owner, and the presumption of a satisfaction or abandonment of the equity.

Our opinion inclines with the defendants on both of these questions; but, as the amount involved is very large, and the Court is not, by the bill, as now framed, put in possession of all the facts and circumstances which are relevant and may have an important bearing on its decision, we will avail ourselves of the fact that the orders and decrees of this Court are not necessarily *absolute* like a judgment in a Court of Law, by may be "moulded and shaped to meet the exigence of each particular case," and order the demurrer to be overruled without allowing costs, and without prejudice to the equity or defense of the defendants
(9) which may be set up by plea or answer, as they shall be advised, for the purpose of giving the plaintiff an opportunity of amending the bill by making further allegations, and the defendants an opportunity to rely on the presumption of satisfaction, release or abandonment of the equity by plea (if so advised), and of afterwards setting out all the facts and circumstances relevant to the question by averment in their answer, should the plea be overruled.

1. The plaintiff alleges that by the proper construction of the marriage articles, the legal effect is to give an estate to the wife for life in all of the estate belonging to her before the marriage, with full power to dispose of it by giving it to her relations or friends, unless there should be issue of the marriage; in which event, the intention was to vest the ulterior interest after the life estate in such child or children,

and he insists that although this intention of making a limitation over in favor of any child or children that might be born of the marriage is not expressed in the articles, it will be implied by the Court from the nature of the relation which the parties had in contemplation, which furnishes the natural and ordinary presumption that the intention is to provide as well for the issue of the marriage as for the wife, and relies on the fact that this is an executory, as distinguished from an executed trust, where greater latitude of construction is allowed in order to give effect to the apparent intention of the parties, and the Court is not bound by the use or omission of technical words.

On the part of the defendants, it is insisted that the only purpose of the parties in making the marriage articles was to give to Mrs. Gray power to dispose of the estate which she owned before the marriage by giving it to her relations and friends, with a restriction upon the power in case she should have children, and that no limitation was intended to be made, and none in fact was made, so as to vest in them an estate after her death; for, if she died first, the husband, it was presumed, would be able to provide for the children, and if he died first, they would be amply provided for out of his estate, and out of the estate which was secured to her. In aid of this construction it was urged that the subsequent acts of the parties were in conformity thereto; for, (10) after the birth of a child, and the death of his wife, General Gray treated the marriage articles as having no further force or effect, and used and disposed of the property as if absolutely his own, and Moore and wife so acted in respect to the land, by selling him the reversion after his life estate; whereas, if the articles had been in force, according to the construction contended for by the plaintiff, he was not entitled to an estate for life as tenant by the curtesy, and Mrs. Moore was entitled to the whole estate, and not simply to a reversion.

It is manifest that the condition of the parties, and the state of things at the date of the marriage, may have an important bearing upon this question of construction, and the Court should be put in possession of all the facts. Was General Gray an improvident, thriftless or dissipated man?—a man of no property and "a fortune hunter," who was not likely to be able to take care of his children? Or was he a prudent business man, with property of his own, and one who could reasonably be confided in to take care of his children, if he should have any? What was the age of Mrs. Parke at the date of her contemplated second marriage? How long had she been married to her first husband without having borne a child? Had she any destitute relatives for whom she supposed herself under an obligation to provide?

These facts have an important bearing, as tending to distinguish the case from that of two young people just starting in life, with whom the

first and uppermost idea of their marriage is to make a provision for children; whereas, in this case, judging by the face of the articles, the most prominent idea was to give the wife power, notwithstanding her marriage, to provide for "her kinfolks."

2. As Moore had power to receive and accept satisfaction for, or release his wife's equity, a presumption arises from the lapse of time during which the defendant Gray had possession and used the property as his, even according to *Cotten v. Davis,* 55 N. C., 430, unless the defendants are able to account for the delay, or to repel the pre-
(11) sumption. It was said on the argument that Moore, the husband of plaintiff's intestate, was not informed of the existence of the marriage articles, and of the estate which had vested in her by force thereof, until within less than two years before the bill was filed. This fact is not distinctly alleged in the bill, and our purpose in not disposing of the case definitely at this stage, is to give the plaintiff an opportunity to amend his bill, and aver the fact distinctly, if it is so, and present the question whether ignorance of the right will prevent the presumption.

It was also said on the argument that the admissions of General Gray, when a demand was made and his attention was called to the existence of the marriage articles, and particularly his offer to refer the matter to the arbitration of mutual friends, is sufficient to repel the presumption. These matters are not set out in the bill with the degree of certainty necessary to give to the demurrer the effect of a positive admission which would repel the presumption; and the demurrer is overruled for the purpose of removing all difficulty in this respect. The plaintiff may amend his bill and charge these matters with certainty by way of anticipating the plea of the defendants (if they are so advised) setting out the fact of the long enjoyment and possession of the property, and relying on the presumption of a release, or satisfaction, or abandonment, which the law makes therefrom.

Whether the defendants will be required to answer in support of this plea, an allegation in the bill charging that there has been no satisfaction and no release, will be an interesting question, in regard to which we intimate no opinion. The statute, and the rule of the common law, obviously give to the lapse of time a technical effect over and beyond that of a mere circumstance, as upon an enquiry in regard to an open question of fact. Whether it is consistent with the policy of this rule to require a party to make admissions as to a matter of fact which will defeat his plea, is a question we leave for future consideration.

PER CURIAM. Demurrer overruled without costs, and without prejudice.

Cited: Shinn v. Smith, 79 N. C., 313; *Mebane v. Mebane,* 80 N. C., 39; *Miller v. Justice,* 86 N. C., 30.

(12)

JOSEPH JOHNSON v. JOSHUA PETERSON.

1. A conveyance, by a woman, after a marriage engagement, and upon the eve of its solemnization, is a fraud upon the rights of the intended husband and will not be upheld, unless it appear clearly and unequivocally, that the husband had full knowledge of the transaction and freely assented to it.
2. Where a woman, being under an engagement to marry, made a week before the marriage, a voluntary secret conveyance of all her property, including slaves, to the defendant, a man of slender means, who, after the marriage took the slaves into his possession, and refused, on demand, to give them up, but claimed them as his own, under such conveyance, it was *Held*, that the husband was entitled to writs to restrain the defendant from removing the slaves out of the State, although no threat to do so was made to appear.

THIS was an appeal from an interlocutory order, made in the Court of Equity of SAMPSON, refusing to dissolve an injunction, and continuing it over to the hearing. *French, J.*

The bill sets forth that the plaintiff intermarried with Susan Peterson on 14 March, 1860; that shortly before the said marriage, and after an agreement had been entered into with the said Susan that they should marry, and only a week before that event, she secretly, and without his knowledge, and in fraud of his marital rights, conveyed to the defendant, Joshua Peterson, by three several deeds, her interest in ten slaves (naming them), and a right to live upon and enjoy a tract of land of 186 acres during the time of her, the said Susan's, marriage life, and providing in said deeds that on her becoming discovert, her right to the said property should revive; that the said deeds are expressed to be, each, on the consideration of five dollars, but that no money or other thing of value was paid for the said property; that the said Susan had, under the will of a former husband, a life estate in the said negroes and land, and that the defendant has taken possession of the said slaves and land, and on the same being demanded, refuses to give them up, and has threatened to run them out of the State; that the defendant is irresponsible in respect to financial means, having no property, except a remainder in two of these slaves after (13) the death of the said Susan. The prayer of the bill is for an injunction and sequestration to prevent defendant from running the slaves out of the State. These writs were issued in vacation, and the defendant answered at the next term. He does not deny the execution of the deeds, nor the time nor circumstances under which they were executed. He denies, however, that any fraud was intended, and says, though he paid no money, that the said Susan had promised him, before the engagement of marriage, to make him such conveyances, and that she owed him for one year's work he had done for her, and that he intended

to give her a credit for what she owed him. He denies that he ever threatened to remove the said slaves from the State, or that he intends to do so, but admits he is a man of slender means, beyond his claim in these slaves, and insists on the validity of his claim to the property under the deeds. He denies that the plaintiff was ignorant of the existence of these deeds, for that one of the family had put him on his guard by telling him in the presence of the said Susan that he would not get what he expected to get by his intermarriage with her, to which he replied that "it was not the property he wanted, but the woman." On the coming in of the answer, the defendant moved to dissolve the injunction and sequestration, which was refused by his Honor, who ordered them to be continued to the hearing; from which order, the defendant appealed.

W. A. Wright, for the plaintiff.
Person, for the defendant.

MANLY, J. The interlocutory order appealed from, continuing the injunction to the hearing, is justified by the facts of the case apparent upon the bill and answer.

The equity of the bill seems to us to be manifest. The time, manner and circumstances altogether, when and whereby the woman stripped herself of every particle of her property, was a fraud upon the rights
(14) of her intended husband. Such a conveyance after a marriage engagement, and upon the even of its solemnization, is fraudulent, and not fit to be upheld, unless the intended husband have full knowledge of and freely assent to it. Such knowledge and assent ought to be clear and unequivocal, and not inferable merely from casual remarks by an indifferent person in the hearing of the husband, and from responses of his made in a spirit of gallantry.

When the right to the relief sought is clear, the Court will incline favorably to ancillary writs intended to make sure that relief. Thus, in the case before us, where the bill is to declare fraudulent and void deeds for slaves and to compel a reconveyance and redelivery of them, the Court will, upon any grounds that are not light and frivolous, put the defendant under an injunction not to withdraw the property from the reach of its process. An injunction imposes no obligation on him that he was not already bound in conscience to fulfill. It only adds a legal penalty to a moral obligation.

Although the principal allegation in the bill of a purpose to remove the slaves beyond the jurisdiction of our Courts is denied by the defendant, yet he admits he sets up claim to them under the deeds in question, and does not deny that he is a man of little or no means beyond the slaves in controversy. This, we think, is sufficient, when added to

the clear equity of the plaintiff's bill, and the consequent unconscientiousness of the defense, to cause the Court to leave the defendant under the injunction.

It should be certified to the Court below that there is no error in the interlocutory order appealed from, and that they do, therefore, proceed.

Per Curiam. Affirmed.

(15)

HECTOR McLEAN v. NEILL McPHAUL and others.

A distributive share in the hands of an administrator, due the wife of a nonresident debtor, can not be subjected to the payment of the husband's debts in this State, by means of an attachment, in equity, under the statute, Rev. Code, ch. 7, s. 20.

Cause removed from the Court of Equity of Robeson.

The bill sets out that Catherine McLean died intestate, in the county of Robeson, some time in the year 1858, seized and possessed of a considerable estate, and left, among other next of kin, a sister, Margaret, who had intermarried with the defendant Neill McPhaul. As one of the next of kin of her sister Catherine, Margaret McPhaul was entitled to a distributive share of her estate. Letters of administration upon the estate of Catharine McLean were granted to one Morrison, who is made a party defendant in this suit. The bill further states that Neill McPhaul, the defendant, is a nonresident of the State, and is indebted to the plaintiff in the sum of one hundred and forty-five dollars, due upon a former judgment, and it prays that the distributive share of the estate of Catharine McLean to which defendant is entitled in right of his wife, and which is still in the hands of the administrator, Morrison, may be decreed in satisfaction of this debt.

Defendant demurred for the want of equity, and the cause being set down for argument upon the bill and demurrer, was sent to this Court by consent.

M. B. Smith, for the plaintiff.
Leitch, for the defendants.

Pearson, C. J. The question is, can the creditors of a nonresident reach a distributive share in the hands of an administrator, which is due to the wife of the debtor, by means of an "attachment in equity" under the statute, Rev. Code, ch. 7, sec. 20?

We are of opinion that the case is not embraced by the statute, for this very satisfactory reason: The distributive share, while (16) in the hands of the administrator, does not belong to the husband.

It is true, by the *juris mariti,* he may reduce it into possession during the coverture, and if he does so, it belongs to him, or he may assign it, and if the assignee reduces it into possession during the coverture, it will belong to him, but until it is reduced into possession, it belongs to the wife, and if the husband dies before that is done, either by himself or his assignee, the interest of the wife is absolute. This is settled; *Arrington v. Yarboro,* 54 N. C., 73, where the subject is fully entered into and disposed of.

The fact that a legacy in the hands of an executor, or a distributive share in the hands of an administrator, which is due to the wife, belongs to her and not to the husband, is the ground of the well established doctrine, *i. e.,* equity will not interfere, at the instance of a creditor of the husband, in order to subject the fund to the satisfaction of the debt, either by compelling the husband to reduce it into possession or assign it for the benefit of his creditors, and thus enable them to reduce it into possession. If the husband chooses to do so, the Courts of Equity, in this State, will not interfere to prevent him and require a settlement on the wife. But neither in North Carolina nor in England, nor anywhere else that we are informed of, do Courts of Equity interfere actively to the prejudice of the wife, and subject her interest without the consent and coöperation of the husband, to the payment of his debts, because it would be doing injustice to the wife to deprive her of the chance to have the absolute ownership if she survives, and of the right to have the interest devolve upon her personal representative if she dies first, whereby it would be first applicable to the satisfaction of *her own* creditors, before it passes to the husband and becomes liable to his creditors. In *Allen v. Allen,* 41 N. C., 293, and *Barnes v. Pearson, Ibid.,* 482, the general doctrine is assumed, and those cases are made exceptions on the ground that where the husband makes an assignment and an interest vests in the assignee, the Courts are then called on to aid
(17) the assignee in like manner as they would aid the husband, to reduce the interest into possession, whereby the wife ceases to be the owner of the fund.

On the same general principle, it is held at law that a legacy of the wife can not be taken under an attachment by the creditor of the husband; *Arrington v. Screws,* 31 N. C., 42.

In short, there is neither authority nor principle to support the position on which the bill is based.

Per Curiam. Demurrer sustained.

SMITHERMAN & SPENCER v. HIRAM ALLEN and others.

Where a debtor conveyed all his property with an intent to defraud his creditors, and then left the State, it was *Held*, that a creditor could not maintain a suit in equity to have his debt satisfied out of the property, under the statute, Rev. Code, ch. 7, s. 20, his remedy being at law.

CAUSE removed from the Court of Equity of MONTGOMERY.

Hiram Allen, one of the defendants in this case, was indebted to the plaintiffs in the sum of $175, due by note and account; and the said Allen, in the month of September, 1859, was seized of a tract of land in the county of Montgomery, and was also possessed of a valuable chattel property. Some time during that month, the defendant Hiram conveyed all his property to his brother, David Allen, and his brother-in-law, Martin Hunsucker, who are the other defendants in this suit, and then left the State.

The bill charges that this conveyance was intended to defraud creditors, and that there was a combination among the defendants for that purpose.

The prayer is for a discovery of the matters relating to this transaction, and that the payment of plaintiffs' debt may be (18) decreed, according to the statute, Revised Code, ch. 7, sec. 20, against the defendants, and for general relief. The defendants demurred to the bill, for the reason that the plaintiffs had a remedy by an attachment at law, and also for that the plaintiffs had not reduced their debt to a judgment. The cause being set for argument upon bill and demurrer, was transferred to this Court.

Mason and *Jackson*, for the plaintiffs.
McCorkle, for the defendants.

PEARSON, C. J. A debtor conveys all of his property with an intent to defraud his creditors, and then leaves the State. The question made by the pleading is, can a creditor maintain a bill to have his debt satisfied by what may be called "an attachment in equity," under the provisions of the statute, Rev. Code, ch. 7, sec. 20? We are of opinion that the case does not come within the provisions of the statute.

It is said the grantee holds the property upon a secret trust for the debtor, and the statute applies to any estate or effects in the hands of a "trustee" holding for the use of the debtor. It is clear that the debtor himself could not enforce such a trust, for the conveyance, although void by the statute of Elizabeth as to creditors, is good between the parties, and neither a Court of Law nor a Court of Equity will interfere at the instance of the debtor; in other words, the confidence reposed by him in the grantee is not recognized by the Courts *as a trust* fit to be

enforced, and as the proceeding under the statute rests on the footing of enforcing a trust, it follows that a trust like that under consideration does not fall within the meaning.

It is settled that such a trust does not come within the meaning of the act of 1812, and can not be sold under an execution at law; *Page v. Goodman,* 43 N. C., 16.

So, it is settled such a trust can not be sold on the petition of an administrator, under the act of 1846; *Rhem v. Tull,* 35 N. C., 57,
(19) and it is said the creditors may reach the property, not on the ground of a trust, but on the ground of *fraud,* which proves that the word "trustee," used in the statute under consideration does not embrace a case of this kind.

It was next insisted that the case is that of an absconding debtor, having "an estate in the hands of a third person, which can not be attached at law, or levied on under execution." Why may not this property and estate be attached at law? The conveyance is void as to creditors, so they may treat the property as if it still belonged to the debtor, and, in fact, it is his property for the satisfaction of debts.

This disposes of our case. *Gentry v. Harper,* 55 N. C., 177, referred to on the argument, is distinguishable from this, but may serve to illustrate the principle. There, the interest of the debtor could not be reached at law by a creditor, who *had obtained a* judgment, and it was subjected in equity, not on the ground of a trust, but on the broad ground "that it was against conscience for debtors to attempt, in any way, to withdraw property from the payment of their debts, and where a Court of Law can not reach it, a Court of Equity will."

In exercising this jurisdiction, the Courts of Equity require that the question of debt or no debt, being a legal one, should be settled by a judgment at law. To meet this, the statute under consideration was passed. It may be that a fraud like that in *Gentry v. Harper* is not provided for by it. But our case is expressly excluded, on the ground that the fraud is one which does not stand in the way of creditors, and they may have an attachment at law, and do not need the interference of a Court of Equity.

PER CURIAM. Demurrer sustained and bill dismissed.

Cited: Greer v. Cagle, 84 N. C., 389.

(20)

GEORGE B. DOUGLAS, Guardian, v. A. H. CALDWELL, Guardian.

Where it appeared that the property, in this State, of a ward residing in another State, consisted of good bonds, at interest, in the hands of his guardian here, a part of which arose from the sale of land, and the ward was nearly of age, and there was no special necessity made to appear for making a transfer of the property, the court of equity, in the exercise of its discretion, refused to order a transfer of the estate to the hands of a guardian appointed in such other State.

CAUSE removed from the Court of Equity of ROWAN.

This was a petition by a guardian in another State to obtain the property of his ward in the hands of a guardian here.

The petition is filed by George B. Douglas, the father of the ward, George C. Douglas, alleging that in April, 1858, he was duly appointed by the Court of Ordinary of Dougherty County, in the State of Georgia, guardian of the person and property of his said son, and gave bond with two good sureties, according to the requirements of the law as it is in that State. An exemplified copy of such appointment, with the bond taken, is filed, and depositions are taken establishing the validity of the bond as to form and as to the solvency and pecuniary ability of the sureties. The petition states that in 1858, the ward was about 14 years old, and that it is his purpose, and that of the petitioner, his father, to remain permanently in the State of Georgia. The petition sets out, further, that as guardian of the person of his son, he has been allowed for the support and maintenance of his son, since the year 1855, by the Court of Equity of Rowan, the annual sum of $300, which, in the year before the petition was filed, to wit, in 1858, was increased to $400. The answer of the defendant is filed, and discloses the fact that the estate of his ward is between 25,000 and 30,000 dollars; that he has not yet fully settled with the former guardian, but he thinks there will be about that amount; that in January, 1859, by a decree of the Court of Equity of the county of Rowan, N. C., the negroes of his ward were sold at public auction, and bonds, bearing interest from date, well secured by sureties, were taken by a commission appointed by (21) said Court, and that when the answer was filed, the credit had not expired. The answer also sets out that about twenty-five hundred dollars of the fund arose upon land, which was sold by a decree of the Court of Equity of Rowan, which also is invested in bonds with good security, bearing interest.

The evidence taken in the cause clearly established the facts set out in the pleadings. The cause being set down for hearing on the bill, answer, exhibits and proofs, was sent to this Court by consent.

Fowle, for the plaintiff.
Wilson, for the defendant.

MANLY, J. There are several reasons which induce us to deny the object of the petition:

The minority of the ward is now of short duration. The fund is safely invested in interest bearing stocks of medium value, and with respect to a portion of it, at least, it can not be changed without loss at this time. The unavoidable losses and hazards of collecting and re-investing so large an amount makes such a measure inexpedient in any stage of a minor's wardship. There ought to be some object of primary importance in view to justify it, so near the close. No such object is suggested. The transmission to the guardian of the ward's person of such amounts as, from time to time, may be deemed proper and necessary for his maintenance and education, at this important period of his life, is matter of little inconvenience. Beyond this, we can conceive of no reason for the removal of the fund at this time, and against it stands the risks and incidental losses which must necessarily attend the transfer.

The petition sets forth that a portion of the fund belonging to the ward consists of moneys and securities for moneys arising from the sale of land. This, in connection with the provision in the Rev. Code, ch. 54, sec. 33, suggests another reason, which has some weight in in-
(22) fluencing the discretion of the Court: The Code provides that when personalty is substituted for realty by a sale of a minor's property, the substituted personalty shall be enjoyed, alienated and devised, and shall descend, as by law the property sold would have done had it not been sold, until it shall be restored by the owner to its original character. Considering this part of the fund, therefore, as real estate, subject to descend upon the heirs-at-law of the present owner, a further reason for retaining it within the jurisdiction of the Court until the ward is of age is apparent. Upon the whole case, we are of opinion that it is unadvisable, at the present time, to make a decree for the removal of the estate.

The petition should be dismissed, but without costs.

PER CURIAM. Petition dismissed.

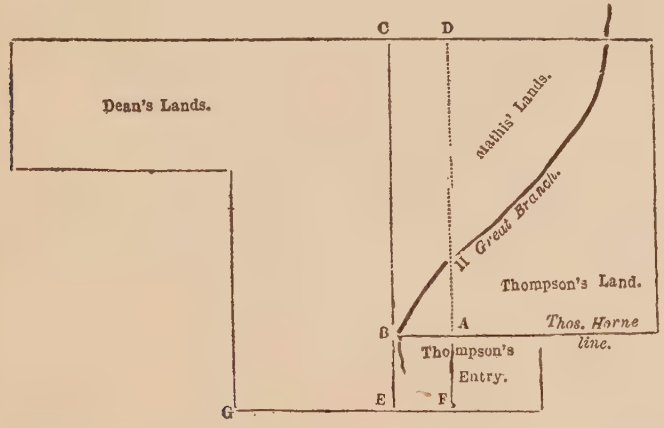
ALFRED THOMPSON and others v. JOHN DEANS.

Where a dispute existed between the owners of contiguous lands as to their dividing lines, and it was agreed in writing to submit the matters to arbitration and to *stand to and abide by such lines* as should be *made and laid down by the referees*, and the arbitrators made an award designating dividing lines between the parties, which the recusant party failed to show were erroneous, it was *Held*, a proper case for the court to decree a specific performance.

CAUSE removed from the Court of Equity of NASH.

THOMPSON *v.* DEANS.

This was a bill to compel a specific performance of an award. John Mathis, Alfred Thompson, one of the plaintiffs, and the defendant, owned contiguous lands, and a disagreement having arisen among the three as to the dividing lines between them, they entered into a penal obligation, dated 19 April, 1851, conditioned as follows: "Whereas, there is a dispute between the said John Deans, Alfred Thompson and John Mathis in regard to the dividing lines of their lands and the said parties have referred the said dispute to Exum L. Curl, Jesse Beal and A. B. Baines, to make lines and settle the said dispute; now, therefore, if the above bounden John Deans, Alfred Thompson and John Mathis, their heirs, executors and assigns, shall stand to and abide by the said lines, as they shall be made and laid down by the said referees, and let each peaceably enjoy the same as allotted to him by the said referees, then the above obligation to be void, otherwise to remain in full force and effect." Signed and sealed by the parties mentioned. The arbitrators met on the day the submission bond was signed, and having all the parties present, went upon the premises and surveyed such lines of the several tracts as at all concerned the controversy, and examined such deeds and living witnesses as were produced. The matters in controversy may be illustrated by the following diagram: (23)



The defendant had insisted that the true boundary of his land was as represented by the letters G, F, D, whereas, the plaintiffs said it was G, E, C, so that the land in dispute is that embraced in the area E, F, D, C, of which the spaces A, B, H, and E, F, A, B, were claimed by Thompson, and the rest of it by Mathis. (24)

After examining into the matter, the arbitrators made up and delivered to the parties the following award: "Know all men by these presents, that we, the undersigned referees, having been called on by

John Deans, Alfred Thompson and John Mathis to settle a dispute in regard to the lines of land between them, and having met on said lands on 19 April, 1851, do agree to the following boundaries, viz., beginning at a lightwood pine (G), Dean's corner in A. Thompson's line, then east 130 poles to a stake, Dean's corner in Thompson's line (F), then north to the original Thomas Horne line (A), then along the said line west to a stake on the west side of the Great Branch, Thompson's corner in Dean's line (B), thence north a line of marked trees to a stake, Dean's corner in Mathis' line (C)."

By which award it will be seen that Deans obtained of Thompson the area E, F, A, B, which is about seven acres, and Thompson and Mathis obtained of the land claimed by Deans the space B, A, D, C, about forty acres. It appears from the testimony that on the delivery of this award, each party took possession according to the lines fixed upon by the arbitrators, and in that manner continued to hold until some time after the death of John Mathis, when the defendant entered upon the territory embraced in the figure B, A, D, C, and still holds the same in his possession. Also, that he continues in possession of the land E, F, A, B, surrendered to him by the award. The suit was brought by Thompson, who offered to make title to the part taken from his claim, and by the children and heirs-at-law of Mathis, and the prayer is for a specific performance of the award by making deeds, etc., and for an injunction. The defendant, in his answer, insists that there is a palpable mistake in the award of the arbitrators, and that it would be hard and unconscionable for the plaintiffs to have a specific
(25) execution of it. The proofs taken in the case are voluminous and contradictory, but it seems that the arbitrators based their judgment chiefly on the fact that the lines adopted by them were old marked lines, corresponding in date with the deeds of the parties, and there were no marks on the lines rejected by them. The cause was heard upon bill, answer, proofs and exhibits.

B. F. Moore and *Dortch,* for the plaintiffs.
Miller, Fowle and *Rogers,* for the defendant.

MANLY, J. The bill is to enforce an award by compelling a specific execution. The submission appears to be by agreement *in pais,* and by reference to it, it is found the arbitrators are authorized to make lines and settle the dispute then existing between the parties in regard to their dividing lines; and they bind themselves to abide by such lines as shall be made and laid down by such referees, and to allow each other peaceably to enjoy the same as allotted. The referees laid down a line of division, and the parties thereupon adjusted their respective possessions in conformity with the same.

After two or three years acquiescence by all concerned, the defendant, Deans, took possession again of a parcel of the land which he had abandoned under the award, and this bill is brought to compel him to abide by the lines established, and to allow each peaceably to enjoy the part allotted to him.

We do not perceive why this object may not be accomplished by the bill. By the submission, the parties contract to do what the arbitrators might direct. When the latter, therefore, made their decision, the submission and award, together, amounted to an agreement; and as this agreement is plainly executory in its nature, it is, in substance, the case of an executory agreement under a penalty. The enforcement of such an agreement, specifically, is a familiar subject of equity jurisdiction. In Russell on Arbitrators, 525, it is said, a bill will lie to enforce a specific performance of an award whenever the matter directed by it is such that it would be enforced by the Court as an agreement or contract—especially when the award be to do anything in respect (26) to lands. This is confirmatory of our view.

The award, it will be seen, does not specially require the parties to release or convey to each other, but this, we think, follows from the making of the line by the arbitrators, taken in connection with the terms of the submission. The parties agree to end all disputes by abiding by the line to be made, and allowing each other to enjoy quietly in conformity with the line. It is a private submission, and we think it clear, by the terms of it, that the arbitrament is conclusive as to the rights of the parties to the land in controversy between them; and, as the award does not convey the title, it would seem to be manifestly intended that their rights should be made effectual by conveyances, and that thus all dispute might be ended. In *Carter v. Sams,* 20 N. C., 321, the arbitrators agreed that defendant should pay all costs, and they assessed plaintiff's damages to $100. It was held that the award was entitled to a liberal construction, and that it should be intended that the defendant was to pay the $100 to the plaintiff. The cases are similar. In neither can the declared rights of the parties be made effectual, except by a construction according to a reasonable intendment.

This is what is called "certainty to a common intent," in the definitions given of the degrees of certainty required in law proceedings; and this degree is all that is required in an award; according to what is said in *Carter v. Sams,* above referred to.

The only other enquiry which arises upon the pleadings and proofs in the cause, is whether the award be such as the Court will enforce specifically. The parties recite in their submission bond that a dispute existed between them as to the division lines of their lands, and they refer it to the arbitrators to make lines. Upon examination of the

proofs in connection with the terms of this submission, the propriety of the plenary power given the arbitrators is apparent. The boundaries are left in great doubt, after the voluminous proofs now on file
(27) are all considered; so far, therefore, from it being hard, unconscientious or fraudulent, the arbitrament, at the time and upon the terms agreed on, was a measure of wisdom for all parties. There is nothing brought forward in the proofs which, regarding the award as of no higher obligation than a contract, would prevent a Court of Equity from ordering its specific execution.

A decree may be drawn directing the parties to execute deeds of release to each other for the parcels of land awarded to each by the division lines established by the arbitrators.

PER CURIAM. Decree accordingly.

Cited: Crawford v. Orr, 84 N. C., 251; *Metcalf v. Guthrie,* 94 N. C., 450; *Pass v. Critcher,* 112 N. C., 407.

JOHN C. ALSTON and others v. JOHN LEA.

Where a husband devised and bequeathed as follows: "I give and bequeath to my beloved wife, D. A., after the payment of my just debts, all my property, real, personal, and perishable, to be hers in fee simple, so that she can have the right to give it to our six children as she may think best," it was *Held*, that under the terms of the will the testator's widow had the power to sell, at her discretion, any one part of the property for the payment of the debts of the testator, so as to release another part from such debts; and BATTIE, J., was strongly inclined to the opinion that she took an absolute interest in all the property.

CAUSE removed from the Court of Equity of HALIFAX.

The only question in this cause arises on the construction of the will of John Alston, the material portion of which are as follows:

"Item 1st. It is my will and desire that all my just debts are to be paid, and for the purpose of paying said debts, I wish negro fellow Cudge, negro boy Mack, and negro girl Milly, to be sold, and, if necessary, to sell my other property, personal or real. I wish the land
(28) on the east side of the road, and also my right and interest in the negroes held by John Crawley, be sold."

"Item 2d. I give and bequeath to my beloved wife, Dolly Alston, after the payment of my just debts, all my property, real, personal and perishable, to be hers in fee simple, so that she can have the right of giving it to our six children, Ann M. Arrington, Mariam B. Allen, Frances A. Alston, John Alston, Gid. Alston and Thomas M. C. Alston, as she may think best."

The bill alleges that Mrs. Alston, being in possession of the tract of land set out in the pleadings, sold and conveyed the same to the defendant for the sum of $...., and that by the will under which she claimed, she was appointed a trustee, and was seized of the land in question for the use and benefit of her children, the plaintiffs, and that the defendant was aware of these provisions of the will. The prayer is, that the defendant convey to the plaintiff the land in question, and account for the rents and profits thereof.

To this bill the defendant demurred, for the cause that by their own showing Dolly Alston was not a trustee for the benefit of the plaintiffs, and that he is, therefore, no trustee himself, and is not bound to answer, etc. He also answered the bill circumstantially, and says that after the fund provided for the payment of the debts of John Alston was exhausted, there was a further indebtment by the estate of about $1,000, with interest, to the executor of Stirling Johnston, and an execution in the hands of the Sheriff of Halifax for that amount, which was about to be levied on the slaves belonging to the estate, and it was to pay this debt, and protect the negro property from execution, that the sale in question was made to this defendant, and the money paid by him was applied entirely to the satisfaction of this debt; that he gave $1,024, which he thinks was a fair price for it; and believed then, and still believes, that he got a good title for it. The cause was set down for hearing on the bill, answer and demurrer, and sent to this Court by consent.

B. F. Moore and *Batchelor,* for the plaintiff.
Conigland, for the defendant. (29)

BATTLE, J. The only question presented by the pleadings which it is necessary for us to consider, is whether Mrs. Dolly Alston took such an interest in the estate of her husband, John Alston, by virtue of his will, as enabled her to convey to the defendant a good title to the tract of land now in controversy.

In the first clause of his will, the testator directs that his debts shall be paid, and for that purpose he specifies three slaves which he wishes to be sold; and if it should be found necessary to sell more property, he points out a certain tract of land and his "right and interest" in certain negroes, then held by other persons. In the second clause, he devises and bequeaths as follows:

"I give and bequeath to my beloved wife, Dolly Alston, after paying my just debts, all of my property, real, personal and perishable, to be hers in fee simple, so that she can have the right of giving it to our six children (Ann Maria Arrington, Mariam B. Allen, Frances A. Alston, John Alston, Gid. Alston and Thomas M. C. Alston), as she may think

best." The plaintiffs contend that under a proper construction of this clause, the testator's widow took all his estate after the payment of his debts, as trustee for his children, and the trust conferred upon her no power to sell the land, and that consequently the defendant, having purchased with a notice of the trust, became himself a trustee for the testator's children. The counsel for the defendant objects to this construction, and insists that the widow took an absolute estate for her own use in the property given her by the will, or if she took in trust for her and the testator's children, she took it coupled with an implied power to sell any part of it, at her discretion, and to apply the proceeds in any manner she might think best for the children.

(30) There is no class of cases, arising from the construction of wills, in which there has been a greater fluctuation of decision than in that which involves the enquiry whether a trust has been imposed upon a devisee or legatee in favor of other persons. Technical language not being necessary to create a trust, any words of recommendation, request, entreaty, wish or expectation, addressed to a devisee or legatee, have been held to make him a trustee for the person or persons in whose favor the expressions were used; provided, the testator pointed out with sufficient clearness and certainty both the subject matter and the object or objects of the intended trust. This was, of course, supposed to be in accordance with the testator's intention, and in the earlier cases a very slight indication of such intention seems to have been deemed sufficient. Thus, in *Massey v. Sherman,* Amb., 530, where a testator devised copyholds to his wife, not doubting that she would dispose of the same to and amongst his children as she should please; this was held to be a trust for the children, as the wife should appoint. Many other cases of a similar kind came before the Courts from time to time, and were decided in the same way, the leaning in each case seeming to be very decidedly in favor of a trust. At last, however, the Courts began to doubt whether they had not gone too far in investing with the efficacy of a trust loose expressions of the kinds above referred to, which, very probably, were never intended to have such an operation. Under the influence of this change of judicial interpretation, *Meredith v. Heneage,* 1 Sim., 542, was disposed of in the House of Lords. There the testator, after having given his real and personal estate, in the fullest terms, to his wife, declared that he had given his whole estate to her unfettered and unlimited, in full confidence and the firmest persuasion that in her future disposition and distribution thereof, she would distinguish the heirs of his late father by devising and bequeathing the whole of his said estate, together and entire, to such of his father's heirs as she might think best deserved her preference. It was *held* by the House of Lords, confirming a decree in the Exchequer, that the

wife was absolutely entitled for her own benefit—Lord Eldon, considering that the testator intended to impose a moral but not (31) a legal obligation on his wife, for which he, as well as Lord Redesdale, relied much on the words "unfettered and unlimited." In this country, the Supreme Court of Pennsylvania has, in a recent case, where the whole subject is much discussed and considered, been governed by the same spirit of liberal interpretation. In that case, *in the matter of Pennock's Estate,* 20 Penn., 268, the testator, after directing the payment of his debts, provided as follows: "I will and bequeath to my wife the use, benefit and profits of all my real estate during her natural life; and all my personal estate of every description, including ground rents, bank stock, bonds, notes, book debts, goods and chattels, absolutely; having full confidence that she will leave the surplus to be divided, at her decease, justly amongst my children," and it was *held* that, by the will, the *absolute* ownership of the *personal* property was given to the widow, with an expression of mere expectation that she would use and dispose of it discreetly as a mother, and that no trust was created in relation to it. The case was ably and elaborately argued by counsel on both sides, and in the opinion of the Court, as delivered by *Lowrie, J.,* the doctrine of both the Roman and the English law on the subject is reviewed with great ability; so that the decision is justly entitled to more than ordinary respect and consideration. In the course of the opinion, the learned Judge says: "It can not be denied that there is a considerable discrepancy in the English decisions on this subject, and nothing less can reasonably be expected. An artificial rule, like the one insisted on here, that is founded on no great principle of policy, and that sets aside, while it professes to seek, the will of the testator, must continually be contested, and must be frequently invaded. And no one can read the English decisions on this subject without suspecting that all important wills wherein similar words are found, became the subjects of most expensive contests, and gave rise to those family quarrels which are the worst and most bitter and distressing of all sorts of litigation. We may well desire that such a rule may never constitute a part of our law. It rejects the plain, common sense of expres- (32) sions, and it is not in human nature to submit without a contest."

In accordance with the spirit of this decision, we find that, not only among the later English cases, but among those of several of the States of this Union, "a strong disposition has been indicated in modern times not to extend this doctrine of recommendatory trust; but, as far as the authorities will allow, to give the words of wills their natural and ordinary sense, unless it is clear that they were designed to be used in a peremptory sense. See 2 Sto. Eq. Jur., sec. 1069; *Sale v. Moore;* 1 Sim., 34; *Lawless v. Shaw,* 1 Lloyd and Goolds, 154; *Ford v. Fowler,*

3 Bea., 156; *Knight v. Knight, Ibid.,* 148; *Hart v. Hart,* 2 Desaus., 83; *Van Dyck v. Van Buren,* 1 Caines, 84; *Ball v. Vardy,* 2 Ves. (Sumner's Ed.), 270, note b." 1 Jarm. on Wills (Perkins' Ed.), 339, note 1.

Tested by the principle of these modern adjudications, there is strong ground for contending that the testator's widow, in the case now before us, took an absolute interest in all his estate under his will. Such seems to be the plain import of the words, for he gives it to her *"to be hers,"* in the strongest language which he could employ, and he gives it to her, not for their children, so that they may have a direct interest in it, but "so that *she can have the right"* of giving it to them "as she may think best." His intention appears to have been to substitute her in the place of himself, and to place her as he had been, under the moral, but not legal, obligation to provide for children who were as much hers as his. And considering that he was much in debt, of which he shows by the first clause of his will that he was aware, and that some of his children were grown up and married, we need not be surprised that he was anxious to provide for his "beloved wife," and to leave her children dependent upon her, rather than her upon them.

This construction is not at all opposed by the decision of this Court in *Little v. Bennett,* 58 N. C., 156, referred to and relied on by the counsel for the plaintiffs. There the devise and bequest by the
(33) testator to his widow was expressly "to raise and educate my children, and to dispose of the same among all my children as their circumstances may seem to require." The intention to create a trust for the children was too direct and obvious for the Court to hesitate a moment in giving effect to it.

But we need not, and do not, decide this question, because we are clearly of opinion that if the testator's widow, in the case now under consideration, did take all his property, real and personal, in trust for their children, she took it with a power, necessarily implied from the terms of the will, to sell either the land or the personal chattels, at her discretion, and to give the proceeds to the children, or to reinvest for their benefit. The tract of land which she did sell to the defendant was sold, as is clearly proved by the testimony, to save the slaves, forming a part of the estate, from being taken under execution for the payment of the testator's debts. The land may be, therefore, regarded as having been converted into slaves for the benefit of the children, and this, we are satisfied, was within the scope of her discretionary power over the estate.

This view of the question is strongly corroborated by the adjudication of the Court of Appeals in Virginia, in *Steele v. Livesay,* 11 Grat., 454, to which our attention was called by the counsel for the defendant. In that case the testator said that, "having implicit confidence in my be-

loved wife, and knowing that she will distribute to each of my children in as full and fair a manner as I could, I hereby invest my said beloved wife with the right and title of all my property, both real and personal, to dispose of to each of my children in any way she may think proper and right." By a subsequent clause of the will it was provided that if the widow should die without making a will, the children should have an equal distribution of the testator's estate. After a full argument, it was decided by the Court that the widow had an unlimited discretion as to the time and manner of distributing the property among the testator's children. She might distribute it, or any part of it, in her lifetime, or at her death by any instrument proper for (34) the purpose, or she might distribute to either child such kind of property as she might choose to give him or her. It was held further, that the widow might sell or convey the whole, or any part of the property, and distribute the proceeds of sale. And that having a discretion as to the time and manner of distribution, a purchaser of land from her was not bound to see to the application of the purchase money.

The course of argument which led the Court, in that case, to the conclusion that the will of the testator conferred upon his widow an implied power of sale, will lead to the same result in our case. Here the legal title of the testator's whole estate of every kind is unquestionably vested in his widow, and the property is declared to be hers for the very purpose that she may have "the right of giving" it to the children "as she may think best." The intention of the testator to give his wife an ample discretionary power over his estate, to be exercised for the benefit of his children, is too clearly manifested to be disregarded. The bill must be

PER CURIAM. Dismissed with costs.

Cited: Cook v. Ellington, post, 373; *Young v. Young,* 68 N. C., 315; *Carter v. Strickland,* 165 N. C., 72.

JOSEPH C. WHITLEY and others, Ex's., v. CHRISTOPHER FOY, Adm'r., and others.

Where an agent deposited money in bank as an ordinary deposit, stating at the time that it was the money of his principal, but desired the officer to place the money to his own credit on the books of the bank, alleging that he might have occasion to use it for the benefit of his principal, and the agent died shortly afterwards insolvent, it was *Held*, that the principal was entitled to the fund, and might follow the same in a court of equity.

CAUSE removed from the Court of Equity of CRAVEN. (35)

Edward S. Jones, the testator of the plaintiffs, resided in the

State of Alabama, but owned a plantation and slaves in the county of Onslow, in the State of North Carolina, upon which he was engaged in planting cotton. The intestate of the defendant Foy, one John Oliver, was the overseer for the said Jones upon this plantation, and was in the habit of disposing of the crops as his agent. In the spring of 1858, Oliver went to New Bern and sold the crop of the preceding year, and received the money therefor, which amounted to the sum of $1,000. This money the said Oliver deposited at the Branch of the Bank of the State at New Bern. When he made this deposit, he stated that it was the money of Edward S. Jones, but that he wanted it placed to his own credit on the books of the bank, as he might have occasion to use it for the benefit of his principal, as he lived in Alabama. Shortly afterwards, Oliver died, when the plaintiffs' testator, Jones, made a demand on the officers of the bank for the money, which they refused to pay. It was admitted by the plaintiffs' counsel in this case that the deposit was not a special one, but that the money was mingled with the other moneys of the bank.

The bill is filed to obtain a decree for the payment of the fund to the plaintiffs as the executors of the said Jones, who has since died; the claim is resisted by the defendants, the administrators of John Oliver, who claim the fund as assets of the estate of their intestate. The Bank of the State is also made a party defendant.

The cause being set for hearing upon the bill, answer, exhibits and proofs, was transferred to this Court by consent.

J. W. Bryan, for the plaintiffs.
Hubbard, for the defendants.

BATTLE, J. The claim of the plaintiffs to the funds in controversy is clearly sustained both by reason and authority. This contest being between the personal representatives of a principal and agent for
(36) an amount of money which the agent had received for the principal, which he always admitted to belong to the principal, the latter certainly has the right to claim what is conceded to be his own, so long as he can identify it. This proposition is too plain to be denied, but the counsel for the defendant Foy, the administrator of the agent, insists that the money can not be identified, because it was deposited in bank as an ordinary, and not a special deposit, to the credit of the agent, and that it thereby became the money of the agent, and he at the same time became the debtor of the principal for the amount. That can not be, because it was deposited expressly as the money of the principal and not of the agent, and was placed by the latter to his own credit solely for the purpose of enabling him to pay it with more convenience to his principal, apply it to his use.

Such being the state of the case, the rule applicable to it is, that "a principal in all cases where he can trace his property, whether it be in the hands of the agent, or of his representatives or assignees, is entitled to reclaim it, unless it has been transferred *bona fide* to a purchaser of it or his assignee for value without notice. In such cases, it is wholly immaterial whether the property be in its original state, or has been converted into money, securities, negotiable instruments or other property, if it be distinguishable and separable from the other property or assets, and has an earmark or other appropriate identity; *Taylor v. Plummer,* 3 Maul. and Sel., 562; *Veil v. Mitchell,* 4 Washington C. C., 105; *Jackson v. Perkins,* 3 Mason, 232; *Scott v. Surman,* Willes, 400; *Whitcomb v. Jacot,* 1 Saulk., 166; *Jackson v. Clark,* 1 Young and Jer., 216." The above extract is from *Overseers v. Bank,* 2 Grat., 544, in which it was held that the plaintiffs were entitled to money deposited to his own credit by their agent, he having soon after died insolvent. The same principle, which is that of following a fund in equity, is clearly settled by several decisions in our State. See *Black v. Ray,* 21 N. C., 433; *Bateman v. Latham,* 56 N. C., 35, and *Wood v. Reeves,* 58 N. C., 271. (37)

The plaintiffs are entitled to a decree for the amount claimed.

PER CURIAM. Decree accordingly.

Cited: Barnard v. Hawks, 111 N. C., 339; *Edwards v. Culbertson, Ibid.,* 344.

TEREST CARMAN v. STEPHEN PAGE.

1. Where both parties to a trade for the sale of slaves had full time for deliberation, and the deeds were executed without secrecy, and attested by a respectable witness, and there was no evidence of mental incapacity, and no sufficient proof of a gross inadequacy of price, it was *Held,* that the transaction should be sustained.
2. Gross inadequacy of price is not sufficient, in itself, to set aside a deed, although it is a strong circumstance, tending with others, to make out a case of fraud or imposition.

CAUSE removed from the Court of Equity of CARTERET.

The bill seeks to have a conveyance of certain land and slaves set aside, on the ground of fraud practiced in procuring it. It alleges that the plaintiff was joint owner with her sister, one Mary Heath, of a remainder in a valuable lot of slaves, dependent upon a life estate in one Edmund Heath, which slaves, it alleges, were worth ten or twelve thousand dollars. The bill further alleges that in the summer of 1857, defendant applied to plaintiff to purchase her interest in said slaves, having several times before importuned her to sell them to him, and

informed her that he was the owner of the interest that had before belonged to Mary Heath, and offered $1,000 for plaintiff's interest, which offer was declined; that some days after this conversation, defendant again called and informed her that he had been informed by a gentleman of the bar that there was some doubt about the title to the remainder in these slaves, after the death of Edmund Heath,
(38) and proposed that they should compromise with the children of Edmund Heath, who were, as he alleged, the claimants of the slaves, and would bring suit for them when the life estate determined; that some time after this last interview, the plaintiff was taken sick, and that while prostrated by disease, she yielded to entreaties of the defendant, and signed the deed in question, which was not even read to her, and of the contents of which she was entirely ignorant, and that the price mentioned in said deed was only $1,100.

The answer denies that the defendant importuned the plaintiff, but alleges that plaintiff, on several occasions, sent for him and offered to sell her interest in the slaves at the price of $1,500, and that on the occasion when the deed was made, he called on her by her request; that the terms of the sale were proposed by the plaintiff herself, and were, that defendant should pay her one hundred dollars down, and the balance in one, two, three, four and five years, with good security, without interest, and that this was a fair price, as Edmund Heath, though a man in advanced life, being between seventy and eighty years of age, was, nevertheless, of robust constitution, and had promise of a long life.

Elizabeth Pearce deposed that she was acquainted with the plaintiff in 1857; that just before the execution of the deed in question, plaintiff sent for her, and desired her to see the defendant and request him to call and see her, that she might sell him her interest in the slaves; that she informed defendant of plaintiff's request, and was at plaintiff's house when defendant called; that the former offered the property for the price of $1,500, which the latter refused to give, but offered her $1,000; but that they did not conclude a bargain. Witness further testified that the plaintiff afterwards sent for her again, which she did; that she was present at this interview, and that the plaintiff still asked $1,500, which defendant still refused to give; that the plaintiff then offered to take $1,100, payable as alleged in the answer, and that these terms were accepted by the defendant; that he then informed the
(39) plaintiff that he would have the notes and the bill of sale drawn, and thereupon left the house; that he afterwards returned with one O'Leary, that Mrs. Carman was sitting on the bed; that O'Leary took a seat near her and read the bill of sale to her, and afterwards read the notes; that the $100 was then paid, and O'Leary left, and that Mrs. Carman seemed satisfied, and that her mind, at these interviews, was

as good as she ever saw it; that she afterwards had many conversations with her, and that she always seemed perfectly satisfied with the whole transaction.

A number of witnesses testified that they considered the plaintiff a woman of sound mind, capable of transacting ordinary business, and also that $1,000 was a fair price for the remainder in the property dependent on the life estate of Edmund Heath.

James A. Perry, a son-in-law of the plaintiff, testified that he had managed her business for her some years, and that her mind was weak, and that she was easily influenced.

Dr. O. W. Hughes testified that the plaintiff sent for him in 1857, in regard to these negroes, and asked him $1,200 for them; and gave as a reason for desiring to sell them, that she was on bad terms with her son-in-law, and wanted to realize means to live on.

Daniel O'Leary testified that he drew the bill of sale and the notes at the request of the defendant, and went with him to the house of Mrs. Carman, and read them over to her twice or three times, and that she remarked that they were according to the contract. This witness attested the bill of sale.

The cause being set for hearing upon the bill, answer, exhibits and proofs, was transferred to this Court by consent.

J. W. Bryan, for the plaintiff.
McRae, for the defendant.

PEARSON, C. J. The allegations of the bill are not sustained by the proof. It is not proved that the plaintiff was of unsound mind at the time of the dealing mentioned in the pleadings. There is no proof that any fraud or artifice was resorted to for the purpose (40) of inducing her to sell. Both parties had full time for deliberation, and the deeds were executed without secrecy, and attested by a respectable witness. So, the plaintiff has no ground to stand upon, except the allegation of gross inadequacy of the price, which is not sufficient to set aside a deed, although it is a strong circumstance, tending with other to make out a case of fraud or imposition.

The price in this case does not appear to have been *grossly* inadequate. The plaintiff offered several times to sell at $1,500, and the difference between that sum and $1,100 can hardly be treated as enough to make out the imputation of fraud. Upon the whole, we are satisfied that the plaintiff had made up her mind that "a bird in the hand was worth two in the bush," and having some fear that the title might be drawn into question, and having no particular wish to retain property of which she could not have the enjoyment, except as a fund to bestow upon her nephews and nieces, who were the parties by whom she apprehended

her title might be disputed, was willing to sell at a "low figure." And the defendant did no more than to avail himself of what he considered a chance "for a speculation." Such dealings, though not encouraged by the Courts, are not forbidden by law.

The plaintiff having failed to established any equity, the bill will be

Per Curiam. Dismissed.

(41)

DAVID SWINDALL, by his next friend, WILLIAM J. McNEILL, *v.* WILLIAM BRADLEY.

Where the owner of a life interest in slaves, a demoralized and needy man, who had made a sale of all his property, enquired of a person whether he could be subjected, criminally, if he removed a slave out of the State, and intimated to another, after a suit was brought, that if he could get the slaves in his possession, the remainderman should never receive any benefit from them, it was *Held*, a proper case for a writ of sequestration.

Appeal from an order made by *French, J.*, at the Fall Term, 1860, of the Court of Equity of Bladen.

The cause having been set for hearing, was heard below upon the bill, answer and proofs filed by both parties, and it was ordered that the sequestration which had theretofore issued, should be dissolved, from which order the plaintiff appealed to this Court.

The facts of the case upon which the decision is mainly founded are sufficiently stated in the opinion of the Court.

Leitch, for the plaintiff.
Fowle and *C. G. Wright,* for the defendant.

Manly, J. Any doubt as to the merits of this case, as it was presented by the bill and answer alone, has been entirely dissipated by the proofs subsequently taken. The case is a strong one for the interposition of a Court of Equity to protect the minor, who is entitled in remainder.

It seems that complainant is a son by a former husband of Mary Bradley, wife of the defendant; that defendant has separated himself from his wife, and has another woman living with him; that he has sold all the property acquired by his marriage, except the slaves in question, and has no property besides; that he consulted with H. H. Robinson some time before the suit, whether he (defendant) would incur any *criminal* responsibility if he sold them, and that he has intimated since the suit was instituted against him, in indirect but intelligible
(42) terms, that if he could again get possession of them, he would put them beyond the reach of the claimant.

These leading facts now developed in the case convince us that the danger to the property in the hands of the defendant would be imminent, and that it is highly expedient and necessary the person in remainder should be protected by the writs heretofore granted in the cause.

The testimony from one witness (Robinson) is, alone, conclusive of the case. From his testimony, it appears the defendant deliberately meditated a conversion of the slaves out and out, to his own use, and was making the plan turn in his mind, upon the point whether it involved any *criminal* responsibility. A person who could entertain such thoughts requires, in the opinion of this Court, other restraints than those of a moral nature.

This is especially so when such a person is found under demoralizing and necessitous circumstances.

Therefore, the decree of the Court below dissolving the sequestration in the cause should be reversed, and a decree in conformity with this opinion to continue the sequestration.

PER CURIAM. Decree accordingly.

AARON ELLIOTT and others v. JOSEPH H. POOL and another.

Where the trustee of an insolvent debtor, under a deed of trust which left out certain creditors, bought property at his own trust sale at less than its value, but without any actual fraud, in a suit by the unsecured creditors to compel a resale of the property for their benefit, it was *Held*, that such trustee was entitled to have *bona fide* debts due him from the trustor satisfied out of the increased price obtained by a resale of the property before the unsecured creditors could come in.

THIS was a petition to rehear a decree of the Court, passed at December Term, 1856. The facts upon which that decree was based are set out in 56 N. C., 17, and they, with the further facts upon which the decision at this term is founded, are sufficiently set (43) forth in the following opinion of the Court.

B. F. Moore, for the plaintiff.
Fowle, for the defendant.

BATTLE, J. When this cause was heard, and an account ordered, at December Term, 1856, the question presented in the petition to rehear was either not argued by the counsel, or if argued, was overlooked by the Court. It certainly was not decided, as appears from the opinion in *Elliott v. Pool,* 56 N. C., 17. It is, therefore, a proper subject for consideration upon the petition to rehear the former decree. The question thus presented is an important and interesting one, and we are

gratified that, in the investigation of the principles upon which it is to be decided, we have been materially aided by the able arguments which have been submitted to us by the counsel on both sides. In proceeding to state the process of reasoning by which we have been led to the conclusion to which we have come, it will aid us to advert to the facts upon which the question is raised. They are briefly as follows: One Jesse L. Pool, being greatly in debt, and, as it afterwards appeared, insolvent, on 30 January, 1841, executed a deed in trust to the defendant Joseph H. Pool, conveying to him a large real and personal estate, consisting of land, slaves and other personal property, being, in fact, all he owned, in trust that he should, when he might deem proper, advertise and sell the same, either for cash or upon a credit, and apply the proceeds to the payment, in the first place, of certain debts recited in the deed, due and owing to the said trustee, or for which he was surety, and in the second place to the payment of a debt due to one John Pool, and then, should there be a residue of property after discharging these liabilities, it was to be conveyed by the trustee to the grantor, Jesse L. Pool. In the year following, Jesse L. Pool died, and shortly thereafter, to wit,
(44) on 1 and 3 December, 1842, the defendant Joseph H. Pool, after due advertisement, sold *all* the property conveyed to him in the deed of trust, and, by his agent, became the purchaser of a valuable tract of land and several of the slaves. The whole amount of sales was sufficient to pay and discharge all the debts mentioned in the first class, and a part of the debt due to John Pool, leaving a part of that debt unpaid. This appears from exhibits filed with the answer of Joseph H. Pool, which contain statements of the accounts of the sale, and the amounts of the several debts secured by the deed of trust. The defendant Joseph H. Pool, being afterwards advised that he could not legally become a purchaser at his own sale, and that the heirs-at-law and personal representative of Jesse L. Pool could, at their discretion, have his purchases declared void, and call for a reconveyance or a resale of the property, procured a friend to take out letters of administration on the estate of the said Jesse L. Pool, and then filed a bill in the Court of Equity against the heirs and administrator of the deceased, calling upon them to elect either to repay him the amount of his bids and take a reconveyance of the property, or to permit him to have his purchases confirmed by a decree of the Court. On this bill such proceedings were had that decree was made confirming the purchases made by the trustee, and perpetually enjoining the heirs and administrator of the grantor in trust, respectively, from setting up a title to the property. The present bill was filed by the plaintiffs, as creditors of Jesse L. Pool, not secured by the deed in trust, charging fraud on the defendant Joseph H. Pool, and seeking to hold him accountable for the full value of the land and

slaves, which he purchased at his own trust sale, and which value was alleged to be much greater than that at which the property was purchased. After an answer was filed to the original bill in 1848, the defendant Joseph H. Pool instituted suits at law against the administrator of Jesse L. Pool for certain debts which he alleged to be due him, and which were not included in the deed in trust. In these suits, the defendant pleaded a want of assets, which was admitted by the plaintiff, and judgments *quando* were taken for the amounts claimed. Af- (45) ter this, the defendant obtained leave to file a supplemental answer, in which he claimed that if he should be held to be accountable to the plaintiffs for the increased value of the land and slaves purchased by him, as has been before mentioned, he should be allowed as credits the amount of the debts due him by Jesse L. Pool, and for which he had obtained the judgments above referred to. The right of the plaintiffs to the account was established by the decree made at the hearing of the cause, and the question whether the defendant Joseph H. Pool is entitled to the credits which he claims, either upon the ground of retainer or as an equitable set-off, is the one now presented to us upon the petition to rehear.

The doctrine of equitable set-off was established as one of the principles of the Court of Chancery prior to the enactment of any statute authorizing sets-off in a Court of Law. Judge Story, in delivering an opinion in *Greene v. Darling,* 5 Mason., 201, in the Circuit Court of the United States, held in Rhode Island, made an elaborate review of all the English cases on the subject, from which he drew the conclusion "that Courts of Equity will set off distinct debts where there has been a *mutual credit,* upon the principles of natural justice, to avoid circuity of suits, following the doctrine of compensation of the civil law to a limited extent. That law went further than ours, deeming the debts, *suo jure,* set off or extinguished *pro tanto;* whereas, our law gives the party an election to set-off, if he chooses to exercise it; but if he does not, the debt is left in full force, to be recovered in an ordinary suit." The learned Judge then proceeds to say, "Since the statute of set-off of mutual debts and credits, Courts of Equity have generally followed the course adopted in the construction of the statutes by Courts of Law, and have applied the doctrine to equitable debts; they have rarely, if ever, broken in upon the decisions at law, unless some other equity intervened which justified them in granting relief beyond the rules of law, such as has been already alluded to. The *American* Courts (46) have generally adopted the same principles as far as the statutes of set-off of the respective States have enabled them to act." In North Carolina we have had a statute of set-off ever since 1756 (see Rev. Code of 1820, ch. 57, sec. 7; Rev. Stat., ch. 31, sec. 80), which is embodied

in the Revised Code, ch. 31, sec. 77, as follows: "In cases where there shall be mutual debts subsisting between the plaintiff and defendant; or where either party may sue or be sued as executor or administrator, and there are mutual debts subsisting between the testator or intestate and either party, one debt may be set against the other, either by being pleaded in bar, or given in evidence on the general issue, on notice given of the particular sum intended to be set-off; and on what account the same is due, notwithstanding such debts shall be of a different nature; but if either debt arose by reason of a penalty, the sum intended to be set-off shall be pleaded in bar, setting forth what is pustly due on either side." It is manifest from the enactment that we allow sets-off to be made at law, where the debts are mutual, without regard to the enquiry whether they be founded on mutual credit, that is, one contracted on the faith and credit of the other, and our Court of Equity will be found to have acted on the same principle with regard to equitable sets-off. See *Iredell v. Langston,* 16 N. C., 392; *Sellars v. Bryan,* 17 N. C., 352; *Bunting v. Ricks,* 22 N. C., 130.

In the case before us, it is contended by the counsel for the defendant Joseph H. Pool, that by the application of this principle, he had a right to set-off the debts due him from the estate of Jesse L. Pool, against the claim preferred against him by the plaintiffs. The counsel insists that he would have had a right to do so as against Jesse L. Pool himself, or against his heirs and personal representative, and, consequently, against the plaintiffs, who, according to the opinion heretofore filed in the case, have "to work out their equity" through the representatives of the deceased debtor. The counsel for the plaintiffs argues, in opposition to this alleged right of set-off, contending that Joseph H.
(47) Pool was bound as trustee by the express words of the deed under which he acted, to sell the property conveyed to him, and after satisfying the debts secured by the deed, to reconvey the residue to the grantor in trust; that his purchase at his own sale did not divest the property, so purchased, out of his hands as trustee, and that consequently he is still bound to convey or account for it, or its value, to the plaintiffs, who stand in the place of the representatives of the deceased debtor. It would be difficult to answer this argument, or to impair its strength, if the sale of all the property conveyed in the deed of trust had been unnecessary, or if the sale had been conducted in an illegal manner, so as to have infected the defendant Joseph H. Pool's purchases with actual fraud; but such does not appear upon the proofs to have been the case. It seems from the account of the sales, and the statement of the amount of the debts secured by the deed in trust, which are filed as exhibits, that a sale of all the property was necessary, and the proofs do not satisfy us that there was any actual fraud in the manner in which

it was conducted. The decree heretofore filed in the cause does not put this defendant's liability to the plaintiffs on that ground, but upon the broad ground of policy, which forbids a trustee to purchase at his own sale. That policy has established "the rule that, however fair the transaction, the *cestui que trust* is at liberty to set aside the sale and take back the property. If a trustee were permitted to buy in an *honest case,* he might buy in a case *having that appearance, but which, from the infirmity of human testimony, might be grossly otherwise."* Such is clearly the rule in the English Courts of Equity, and the reason upon which it is founded; and we believe it will be found that our Courts of Equity have adopted the same rule, and for the same reason. See Lewin on Trusts, 87 Law Lib., 394 (m. p. 460). According to this rule, then, the purchase by a trustee at his own sale is not absolutely void, but only voidable at the election of the *cestui que trust.* The latter may, if he think that it is his interest to do so, let the purchase stand, and compel the trustee to pay the price, or he may have the sale set aside and the property resold. The rule is manifestly well (48) adapted to accomplish the purpose which it has in view, which is to prohibit trustees from attempting to make a profit out of the property which they are entrusted to sell, for if they, by purchasing it, make a bad bargain, they may be held to it. There can not be a doubt, then, that if, in the present case, Jesse L. Pool, the grantor in the deed of trust, were alive, he could, in a Court of Equity, have the purchases of the land and slaves made by the trustee set aside and the property resold, and hold the trustee responsible for the price obtained upon such resale. But could he recover from him the amount of the advanced price without being liable to have any *bona fide* debt which he owed the trustee set-off against his demand? We think not. The claim of each against the other would be mutual, and in equity the real debt due from one to the other would be the excess of one of the claims over the other. When the *cestui que trust* came to seek the enforcement of an equity by the Court, he would be met by the maxim "that he who seeks equity must do equity." The original considerations upon which these debts are founded are not set forth in the supplemental answer, but from the transcripts of the record of the judgments obtained thereon, it would seem that they were moneys paid by the trustee as surety for his *cestui que trust,* and if so, it would be a hard rule which would enable the *cestui que trust* to recover the full value of the property purchased by the trustee at his own sale, without repaying to him money which he had been compelled to pay as the surety of his *cestui que trust.* In *Iredell v. Langston, supra,* HENDERSON, C. J., said: "I doubt whether a creditor can call the funds out of the hands of the trustee without paying all the debts of the *cestui que trust* to the trustee." He was not speaking, of

course, of a creditor whose debt was secured by a deed in trust; and if there be a doubt whether any other creditor could call the funds out of the hands of the trustee without paying the debts of the
(49) *cestui que trust* to him, surely the *cestui que trust* himself could not.

If the proposition, then, be established that the defendant Joseph H. Pool would have had a right to set-off his debts against the demand of Jesse L. Pool himself, we think it plain that the Court of Equity, acting in analogy to the express words of the statute, as to a set-off at law, must have allowed the defendant's debts to have been set-off against the demand of the *cestui que trust* in a suit by his representatives. It has already been shown that the plaintiffs stand in the place of these representatives, and, of course, have no greater equity than they would have. The defendant can not, however, have the same right of set-off in his representative capacity, as executor or administrator of some other person. This is settled in *Sellars v. Bryan,* 17 N. C., 358, upon the ground of a want of mutuality in the debts.

It will be ordered, then, that the defendant Joseph H. Pool shall be allowed a credit for all *bona fide* debts due to him in his own right, which he can prove against the estate of Jesse L. Pool. In making this proof, the judgments which he may have obtained against the administrator of the said Jesse L. Pool shall not be evidence for him, because the administrator was not interested in contesting the existence or legality of the alleged debts, and the plaintiffs, as creditors, were not parties to the suits.

PER CURIAM. Decree accordingly.

Cited: *March v. Thomas,* 63 N. C., 88; *Scott v. Battle,* 85 N. C., 195.

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(50)

LETITIA BROWN, Adm'r of M. L. BROWN, Dec'd, v. THOMAS W. HAYNES.

1. Where a partner, whose duty it is to keep the books, seeks to make a charge in his own favor, which is not supported by a proper entry in the books, he must account for that fact, and can only support the charge by clear proof; every presumption being against him.
2. Where one entered into a copartnership with his son-in-law, and it was agreed that the father-in-law should furnish a house for a shop, tools, etc., and a house for the defendant to live in, and that he "should be at no expense," it was *Held,* that these words must be intended to mean expense for things connected with the business, and not family expenses.
3. One partner can not, without the express concurrence of his co-partner, make a note of the firm payable to himself and charge the firm therewith.

4. Where A, who was the active partner, and the bookkeeper of a firm, sought to charge it with the value of a slave which it was alleged belonged to the firm, and had been appropriated by B, his co-partner, to his individual use, it was *Held*, that in the absence of any charge upon the books of the firm, the mere allegation of it in his answer, supported by vague and improbable testimony that such slave belonged to the firm, was not sufficient.

5. Where A, who was the active partner of a firm, and its bookkeeper, set up a claim against the firm for money which the answer alleged was due the partners jointly, for services rendered independently of the co-partnership, but which were appropriated by B to his own use exclusively, it was *Held*, that this could not be made a charge upon the firm in the absence of proof that the money had been appropriated to the purposes of the firm, there being no entry on the books to show the fact.

6. The office of an exception is to call the attention of the court to some specific matter or item in an account in respect to which error is alleged; if it does not answer this purpose, the court will not notice it.

CAUSE removed from the Court of Equity of ROWAN, and brought up upon exceptions to the report of the Master.

The bill is filed against the defendant as surviving partner of the firm of Brown & Haynes, and prays for an account and settlement of the firm business, and the plaintiff is the administratrix of M. L. Brown, the deceased partner.

About 1851, the defendant and plaintiff's intestate entered into a co-partnership for the purpose of carrying on, in the town of Salisbury, the business of tanning, shoemaking and harness making. There were no written terms of co-partnership, but the defendant, in his answer avers that by the terms of the parol agreement, "the capital was furnished by the plaintiff's intestate without interest, and the tan yard and a house for the defendant to live in, were to be furnished without rent, and also the shoe shop without rent; and his mules to grind the bark, and old Jesse, the tanner, without charge." "And in consideration of this capital, etc., the defendant was to give his personal (51) attention to the business of the copartnership, and they were to share equally in the profits and losses of the said firm." The partnership continued up to 1857, when Brown died.

In his answer, the defendant seeks to have an allowance for four notes; one for $960.79, dated 15 February, 1855, which, he avers, "was given on the settlement of the estates of Henry W. Brown and Michael Brown, one-half of this sum belonged to this defendant, and the other half to plaintiff's intestate"; another for $525, dated 8 August, 1853; "this was given for a negro boy, Burton, the property of the firm, taken by the intestate"; another for $600, dated 2 November, 1854, "for money of the firm received by plaintiff's intestate"; and one other for $1,152, dated 6 May, 1853, "given for money of the firm received by plaintiff's intestate."

These notes, amounting in the aggregate to the sum of $4,344.46, were

all in the handwriting of the defendant, both the bodies and the signatures, the name of the firm having been signed to them by defendant, who, it is admitted, was the active partner, and kept the books, made the entries, hired the hands and paid them, and, in fact, was the general manager of the business.

Defendant introduced in evidence the deposition of one W. H. Haynes, his father, who deposed that in a conversation had with plaintiff's intestate, a short time after the firm was organized, that intestate said to him that he "was to furnish everything," and "that T. W. Haynes was to be at no expense." The witness Haynes further deposed that plaintiff's intestate told him that he had administered on the estate of Henry Brown, and that T. W. Haynes had administered on the estate of Michael Brown; that Haynes was to attend to the business of both estates, and that the commissions were to be equally divided; that Brown afterwards told him that the estates were settled; that the commissions on both amounted to between $900 and $1,000; that he had used the entire sum himself, but that he was responsible to T. W.
(52) Haynes for one-half of it. He further deposed that he sold a boy, Burton, to the firm, and that he was paid for out of the firm funds; that plaintiff's intestate afterwards took this boy to his plantation, and told him, witness, that he was to account for him to the firm; witness did not recollect how much he received for Burton; that he sold the firm another boy at the same time, and though he got between $700 and $800 for both.

The defendant, who was a son-in-law of plaintiff's intestate, as was shown, was a man of slender means, and had been, for several years previous to the organizing of the co-partnership, engaged in clerking, and Michael Brown, his employer, deposed that when he left him, he was indebted to him (Brown) to the amount of $70, which was paid by his father, W. H. Haynes. The father of the defendant also stated, upon his cross-examination, that during the continuance of the co-partnership, he had let his son have money at different times, that the largest sum he recollected letting him have was $400; and that of this money so supplied, $400 was borrowed by the firm to purchase hides with, half of which had been paid back by the firm—the rest was a gift to his son.

This witness lived, during the existence of the firm, in the county of Iredell, some twenty miles from Salisbury.

The answer also avers that there was a note on Moses Rymer and Frederick Mowery, payable to M. Brown, for the sum of $600; that this note, though made payable to Brown, was the property of the firm, and was taken for firm debts, and the defendant seeks to have it accounted for as such in the settlement.

There was no further evidence of these various transactions, and no entries on the books of the firm in relation thereto, nor was any mention made therein of any such matters.

Upon the coming in of the Master's report, defendant filed the following exceptions:

1. Defendant excepts to the whole report, for the reason that the testimony does not sustain the report.

2. Defendant excepts to the report for the reason that the commissioner has charged for Jesse's services at one hundred and fifty dollars per annum for five years, making $750, when the witness (53) W. H. Haynes proved that there was to be no charge for Jesse.

3. Defendant excepts to the report for the reason that W. H. Haynes proved that T. W. Haynes was to be at no expense, but that the family expenses were to be borne by Brown, but that the Master had allowed only the rent of the dwelling house and other buildings connected with the business, and for the services of two negro women, whereas, he should have allowed for the whole expense of the family.

4. Defendant excepts to the report for the reason that the commissioner refused to allow as a charge against the firm in favor of defendant four notes amounting to the sum of $4,344.46.

5. Defendant excepts because commissioner refused to charge the plaintiff with the value of the negro boy Burton.

6. Defendant further excepts because the commissioner failed to allow his one-half of the commissions received upon the estates of Henry and Michael Brown.

7. Defendant excepts because the commissioner refused to allow for any money advanced to the firm, when he should have allowed at least the sum of $500; that W. H. Haynes proved two hundred dollars advanced by him and applied in the purchase of hides.

8. Defendant excepts to the report of the commissioner for the reason that he has not allowed the note of Rymer & Mowery, principals, and B. B. Roberts, S. R. Harrison and J. J. Summerell, sureties, for $600, with a credit of $75, which note, though payable to M. L. Brown individually, was indirectly firm property, and placed by this defendant as firm property in the hands of L. Blackmer, and for which this defendant holds his receipt.

Upon the coming in of the report and the filing of the exceptions, the cause was set down for argument, and transmitted by consent to this Court.

Fleming and *James E. Kerr,* for the plaintiff.
Boyden and *B. R. Moore,* for the defendant.

PEARSON, C. J. Before entering upon the exceptions, two (54) general remarks will serve to give "color and complexion" to this

whole case. "Defendant admits that he was the active partner, *kept the books, made all the entries,* and received and disbursed the funds, hired hands and paid them, and did all the other business of the firm."

It follows that if the proper entries are not made, so as to show *on the books* the condition of the business, it was the fault of the defendant, and he will not be allowed to take advantage of his own wrong. The defendant makes a charge against the firm amounting to more than four thousand dollars; it is not supported by any entry on the books, and instead thereof, the defendant relies "on four notes" purporting to have been executed by the firm to himself, with different dates, and for the several sums, amounting in all to the sum total claimed, and professes in his answer to give the transactions constituting the consideration. These notes are in his handwriting and the name of the firm signed by him. There is no proof that they were ever exhibited to the deceased partner, or were ever seen by any one in his lifetime. These circumstances detract much from the credit which might otherwise be due to the answer, and reflect unfavorably upon the testimony of the defendant's father, which is relied on in support of several of his charges.

1. The first exception is overruled because of its generality. The object of an exception is to call the attention of the Court to some specific matter or item in the account, in respect to which error is alleged. If an exception does not answer this purpose, the Court will not notice it.

2. The second exception is overruled. Neither W. H. Haynes, nor any other witness, proves that no charge was to be made for the hire of Jesse, and the allegation of the answer is not only unsupported, but is opposed by the weight of the evidence. The tan yard tools and fixtures, shoe shop, house and lot, which it is admitted the partner Brown was to furnish free of rent, in compensation for the services of the defendant, was worth an annual rent of some five hundred dollars.

(55) Two hundred and fifty dollars was a fair allowance for the services of the defendant, who was a young man, and had no experience in the business, and was to be also allowed one-half the profits.

3. The third exception is overruled. The witness W. H. Haynes, who is the father of the defendant, deposes that Brown, whose daughter his son had recently married, told him that he was to furnish everything, and that the defendant was to attend to the business, and "was to be at no expense." The proper construction of this is, that Brown was to furnish the tan yard, shoe shop, houses, tools and stock on hand, that is, *everything connected with the business.* It would be a strained construction to make the words include provisions for the use of defendant and his family, and also *their clothes* and furniture, and other necessaries for housekeeping! Had this been the understanding, the books

would have contained many entries in respect to such articles, whereas, there is no entry of the kind, and the defendant does not, in his answer, allege that the "victuals and clothes" of himself and wife were to be furnished by Brown. He says that Brown was to furnish, without charge, the tan yard, tools, etc., his mules to grind the bark, and old Jesse, the tanner, and the shoe shop, dwelling house and lots, "these were all to be furnished without charge." So, the *probata construed* (as contended for) goes beyond the *allegata!*

4. The fourth exception is overruled. This applies to the four notes, amounting to $4,344.46, which are referred to above. The idea that a partner, without the express occurrence of his co-partner, can make a note of the firm payable to himself, and charge the firm with it, is too monstrous to be entertained for a moment! The only motive that can prompt one to manufacture secret evidence of this kind must be that he prefers to keep the evidence in his pocket, rather than put it on the books, where it would be subject to the inspection of his co-partner. In our case, the proof is, that the defendant did not have the means to enable him to advance such large sums for the use of the firm; indeed, it would seem that he was barely able to support himself (56) and his wife.

5. The fifth exception is overruled. The answer seeks to charge the firm with a note for $525, dated 8 August, 1853, and sets forth "this note was given for a negro boy, Burton, the property of the firm, taken by the intestate." This is one of the four notes embraced in the fourth exception, and the defendant failing in his attempt to have the note allowed, seeks to set up a charge against the firm for the value of the slave, on the ground that the slave was purchased and paid for by the firm, and afterwards appropriated by the intestate to his individual use. If such was the case, the intestate ought to have been required, when he took the slave, to give his note *to the firm,* or been charged with the amount on the books, and it was a strange notion on the part of the defendant that he could make it the foundation of a note by the firm to himself for the value of the slave. This circumstance, together with the absence of any entry on the books in respect to it, puts suspicion on the transaction. It is proved that the slave went into the possession of Brown, and was claimed by him as his individual property. For the purpose of showing that he was bought and paid for by the firm, the defendant relies on the testimony of his fathehr, who says: "I sold the firm a boy, Burton; he was paid for out of the firm funds; afterwards, Mr. Brown took the boy to his plantation, and told me he was to account for him to the firm. I don't recollect what I got for Burton; I sold them another negro at the same time; I think it was between $700 and $800 that I got for both boys." No explanation is given how this

witness happened to know the fact that the price of this boy was "paid for out of the firm funds." Witness says, "I don't recollect when I sold him, nor do I recollect *where* Thos. Haynes lived at the time." It may be his son told him so; it was in character with the fact that he should, thereupon, make a note payable to himself for the full value of the boy, and put the name of the firm to it. But, however this may be, as it was the business of the defendant to keep the books, and to
(57) have charged Brown with the value of the boy, if, in truth, he had been the property of the firm, in the absence of any entry on the books, we can not, upon loose testimony like this, declare that the defendant has supported the charge; and strongly incline to the opinion that, as it was not a part of the business of the firm to trade in negroes, as no bill of sale is produced by the defendant, who ought to have taken one, and no entry was made on the books in respect to it, connected with the fact that the defendant manufactured the note above referred to, that defendant bought the boy as the *agent* of Brown, and not as a member *of the firm;* at all events, there is no sufficient proof that the slave was paid for out of the funds of the firm.

6. The sixth exception is overruled. The answer seeks to charge the firm with a note of $960.79, dated 15 February, 1855, and sets forth: "This was given on the settlement of Henry W. Brown and Michael S. Brown's estates, one-half of this sum belonged to this defendant, and the other half to M. L. Brown." This is also one of the four notes embraced in the fourth exception, and the defendant failing in his attempt to have the note allowed, seeks to set up a charge against the firm for the amount on the ground that the firm had received the commissions due on settlement of the estates of Henry and Michael Brown. If such was the fact, the books of the firm ought to show it, but there is no entry on the books, and no proof of the allegation, and the firm does not seem to have been in any way connected with these two estates, except by the strange notion of the defendant that he could make it the foundation of a note by the firm to himself, as he did in respect to the slave Burton.

7. The seventh exception is overruled. It appears by the proofs that the defendant had been acting as a clerk in a store for a year or two before he married, and entered into business with his father-in-law; he had no funds when he left the store, and was actually in debt to his employer some seventy dollars. So, he was not able to make advances for the firm, and does not allege in his answer that he did so.
(58) The evidence of his father, on which this exception is based, is another instance where the *probata* reaches beyond the *allegata.* W. H. Haynes deposes: "I let him (my son) have money at different times; the largest amount I recollect of letting him have at any one time was $400." In answer to a question on cross-examination, "Did you

make a gift of the money to your son which you said you let him have; if not, did you lend it to your son or to the firm, and was it ever paid back to you?" The witness says: "Not the whole of it; $400 was borrowed by the firm to purchase hides with, and one-half of it has been paid back by the firm; the balance of the money was a gift." This witness lived some twenty miles distant, in another county, and had no opportunity of knowing the business of the firm, except what was communicated to him by his son. So, the most charitable construction of his testimony is, that *his son told him* that the money was borrowed by the firm. The books furnish no evidence of the fact that this $400 went to the use of the firm, and in the absence of that proof, this evidence is not sufficient to support the charge against the firm.

8. The eighth exception is overruled. This is another item embraced by one of these "four unfortunate notes." It is enough to say that the note of Rymer and others for $600 is, on its face, payable to M. L. Brown, individually, and there is no evidence that it ever did become the property of the firm.

In passing on all the exceptions, we have been governed by a well established rule in the law applicable to co-partners, *i. e.*, where a partner, whose duty it is to keep the books, seeks to make a charge in his own favor, which is not supported by a proper entry on the books, he must account for that fact, and can only support the charge by clear proof; for every presumption is made against him, inasmuch as between partners their books have the verity of a record. If the defendant, by the application of this rule, has lost any one claim which is a just one, it is his misfortune, and the result of his own neglect in not making the proper entry. The matter was not helped by his attempt to manufacture evidence in order to supply the omission, and he was cer- (59) tainly ill advised in urging charges upon insufficient proof.

There will be a reference in order to show the balance after bringing into the account the sum of $2,021.49, which was omitted, and the report will be in all things confirmed.

PER CURIAM. Decree accordingly.

JOHN G. FLEMING, Ex'r., v. JEFFRY MURPH.

1. Where, in a suit for an account, plaintiff obtained leave to examine defendant upon oath, before the master, and he was interrogated as to the items of plaintiff's account, it was *Held*, that defendant's answers were evidence for himself, only so far as they were responsive to the questions, and that he could not, in this way, prove his charges against plaintiff.
2. Where the plaintiff, in a suit, failed to file a replication to the answer, and the parties proceeded to take proofs in the cause, this was *Held*, a waiver by the defendant of a replication, and the court allowed an amendment under s. 17, ch. 33, Rev. Code.

CAUSE removed from the Court of Equity of ROWAN.

The bill is filed against the defendant as a partner of the plaintiff's intestate in a saw mill, and prays for an account and discovery of the matters pertaining to the co-partnership.

Upon the coming in of the answer, the cause was referred to the Master to state an account, and leave was given to examine the defendant upon oath.

Upon his examination before the Master, he testified that plaintiff's account was correct, with the exception of two items; he then proceeded to state that the plaintiff's intestate was indebted to him for work done on his farm, and also on his mill, for which sums he alleged the intestate had failed to give him credit on the books; these he proceeded to prove in detail.

(60) Plaintiff objected to the defendant's proving his account by his own oath, for the reason that it was more than two years old, and to his proving more than sixty dollars of it, if it were not two years old. But the Master permitted him to prove his whole account. For this the plaintiff excepted to the report.

The cause being set for hearing upon the bill, answer, proofs, report of the Master and exceptions filed, was transmitted to this Court.

Fleming and *Barber,* for the plaintiff.
Boyden, for the defendant.

BATTLE, J. There is one question embraced in the plaintiff's exception to the Master's report, which, if sustained, will render it necessary to have the account retaken. It is, that though the plaintiff examined the defendant, under an order of the Court, obtained for that purpose, his answers are not evidence for himself, except where they are directly responsive to the interrogatories put to him. It is clearly settled that an answer to which a replication has been filed, is only evidence for the defendant, in the particulars in which it is responsive to the allegations of the bill, and that all other matters of defense therein set up must be proved by the defendant; 2 Story Eq., secs. 1528 and 1529. Neither Judge Story nor any other elementary writer whose work we have examined, states, particularly, what effect is to be given to the answers made by defendant when examined upon interrogatories, but in the case of *Chaffin v. Chaffin,* 22 N. C., 255, RUFFIN, C. J., whose knowledge of equity practice was extensive and accurate, said with respect to the examination of a defendant upon the stating of an account before the Master, that "it has been thus made evidence for him, so far as it is responsive to the interrogatory, in the same manner, and upon the same principle that the defendant's answer is evidence for him." "In suits for accounts" (he continued), "it is impossible the pleadings can put

every matter precisely in issue, and, therefore, when the parties go before the Master, the plaintiffs may help out their bill by special interrogatories to the other party. But then, the interrogatories (61) must be looked at in the light of being particular charges, supplemental to those more general ones of the bill; and so the responses are, in this sense, to be transferred to the answer, and made evidence in the cause, though subject to contradiction." It appears, then, that the answers made by a defendant to interrogatories upon his examination before the Master, are evidence for him, upon the same principle, and to the same extent only, as is his answer to the bill. It follows that if if he be examined as to the items of the plaintiff's account, his reply will be evidence for him, upon the ground that as to them the plaintiff has made him a witness in the cause, and the same rule would apply as to any other matters about which the plaintiff might think proper to interrogate him; but he can not be allowed to become a witness for himself to prove charges which he may have made against the plaintiff, and as to which no interrogatories have been put to him. Such charges he may prove to the extent of sixty dollars, if he be prepared to do so, under the book-debt law; and all above that amount he must prove, if he can, by independent testimony. In the present case, however, the counsel for the defendant contends that the answer to the bill must be taken as true, because there was no replication filed. This would be so if the parties in the Court below had not proceeded to take proofs, as if a replication had been filed. The transcript shows that the cause was set for hearing upon bill, answer, proofs, report of the Master and exceptions filed, and then, by consent, was transferred to the Supreme Court. When proofs have been taken, we consider the case as if a replication had been filed, and we allow an amendment to that effect here, as we are authorized to do by sec. 17, ch. 33, Rev. Code; see *Jones v. Poston,* 55 N. C., 184.

The cause must be referred again to the Master to state an account between the parties, upon the principle herein declared.

PER CURIAM. Decree accordingly.

(62)

AMELIA WILLIAMSON and others v. H. B. WILLIAMS.

1. A guardian is entitled to commissions on payments made for goods bought of a firm, of which he was a member; but not on charges for board while his ward lived in his family.
2. Where a guardian waited six months after the principal in a note, held by him as guardian, died insolvent before he sued the surety, who also became insolvent before suit was brought, such surety, though much indebted, being, up to one month before his failure, in good credit, and failed suddenly, the guardian having opportunity all the time of knowing the true condition of the obligors, it was *Held*, that by his laches he made himself responsible for the loss of the debt.

CAUSE removed from the Court of Equity of MECKLENBURG.

The defendant having been held liable to account by a previous declaration of this Court, it was referred to A. C. Williamson, Esq., Clerk and Master in Equity of MECKLENBURG, to state the account between the defendant and his wards. At this term the commissioner filed reports, setting forth, separately, the defendant's indebtedness to his wards, to which both plaintiff and defendant excepted. The plaintiff and defendant excepted. The plaintiff excepted because the commissioner allowed five per cent commissions on individual vouchers (naming them by their numbers), being accounts for goods and money furnished to complainant Amelia by the firm of H. B. & L. S. Williams, of which he was a member.

2. The plaintiff excepted to the allowance of commissions on the sums mentioned in said report, charged by the defendant against his ward Amelia for her board in her guardian's family.

The defendant excepted to the commissioner's report because that he was charged with a debt, due by bond from John E. Penman and W. W. Elms to the defendant, as guardian, for principal and interest, about $1,192. The commissioner reports the testimony, which proves the facts to be, in substance, that the bond was given for the hires, for the year 1855, of slaves belonging to the defendant's wards, which bond (63) fell due on January, 1854. Penman having made a deed of trust of all his property in the latter part of 1854, died intestate in May, 1855, and at July Term of Mecklenburg County Court of that year administration was taken on his estate. In November following, suit was brought on the bond against the said administrator and the surety, returnable to January Term, 1856, of the said Court. At April Term, 1856, the pleas of fully administered were found in favor of the administrator, and a judgment was taken against Elms for the debt; an execution was issued thereon, and *"nulla bona"* returned by the Sheriff of Mecklenburg, Elms, in the meantime, having also failed. In November, 1854, Penman made a deed of trust of all his property for the payment of his debts. The property consisted of two houses and lots in Charlotte, and a large number of interests in gold mines of uncertain value, and at the time of his death was utterly insolvent. Elms, the surety, from January, 1854, to October, 1855, was in the possession of a large amount of property; in the latter month (October) judgments were taken against him to the amount of $167,714; of which judgments, the amount of $46,568 was taken by the Bank of Charlotte, of which the defendant was the president. Elms' credit was good until shortly before the rendition of these judgments, though it was generally known that he was very largely indebted. After these judgments, he was generally known to be insolvent. Penman, Elms, and the defendant, all

three, resided in the town of Charlotte. One witness stated that in the winter of 1854, or early in the spring of 1855, he was protested as the endorser of Elms' paper, in the Bank of the State, and he refused to endorse for him any further. It appeared that each of the banks know that Elms was doing business in the other, but neither knew of the amount of his liabilities to the other.

On these facts, the commissioner thought the guardian was guilty of negligence, and so charged him with the amount of the debt.

Thompson and *Fowle,* for the plaintiff. (64)
Wilson, for the guardian.
Lowrie, for one of the wards, made defendant.

BATTLE, J. This cause now comes before us for further directions, upon the exceptions taken by both parties to the Master's report. The complainants except to the commissions allowed the defendant, Williams, as guardian, upon the disbursements for bills paid for his wards to mercantile firms of which he was a partner. We see no reason for this exception. The guardian was as much bound to make payment to the partnership of which he was a member, for goods purchased for his wards, as he would have been to any other partnership or person. The exception is overruled.

But the next, which is to the allowance of a commission on the sum retained by him for the board of his ward with himself is allowed. We suppose that an executor or administrator can not claim a commission on a sum retained in payment of his own debt, upon the ground that a retainer can not be considered a disbursement, within the meaning of the statute which gives commissions. So, we think a guardian can not consider that as a disbursement, with reference to commissions, which consists merely in keeping in his own pocket money due from his ward to himself.

The exception of the defendant, Williams, is that the Master has refused to credit him with the amount of a bond and the interest thereon, payable to him as guardian by John E. Penman and W. W. Elms. The bond was given for the hire of negroes during the year 1853, and became due on 1 January, 1854. It was for the sum of $1,089, with a credit of $107.50, endorsed as paid on 18 August, 1855. The defendant alleges that the bond was lost without any negligence on his part, but the Master reports to the contrary, and the exception brings the question before us for review. Upon an examination of the testimony, and applying it to the law as established in relation to the responsibility of guardians, we are led to the conclusion that the Master's report is correct.

In Rev. Code, ch. 54, sec. 23, it is made the duty of the guardian (65) to lend out the surplus profits of his wards' estate upon bonds with

sufficient security, but it is expressly required of him "that when the debtor or his sureties are likely to become insolvent, the guardian shall use all lawful means to enforce the payment thereof, on pain of being liable for the same." The guardian, then, was acting within the line of his duty in permitting the bond to remain uncollected when it fell due, as both the principal and his surety were then (as he had every reason to believe) entirely solvent. Such, and no more, is the effect of the decision in *Goodson v. Goodson,* 41 N. C., 238, to which we were referred by the defendant's counsel. But when the principal obligor failed, by making an assignment, in trust for the payment of his debts, in the latter part of the year 1854, it was the duty of the guardian to take immediate steps for the collection of the debt, or have it better secured. It will not do to tell us that it is not proved that he knew of the assignment. He lived in the same town with the principal debtor, knew that he had but little property except in gold mines, in which he was a speculator, and of the value of which nobody could tell. He ought then to have kept himself informed of the pecuniary condition of that debtor, and it was negligence in him not to have done so, for if he had, he might have saved the debt. After the insolvency of the principal, he was not justified in relying solely upon the surety for so large a sum, no matter what may have been the apparent wealth and actual credit of that surety. That such has been the construction of our statute in relation to the duty of the guardian in such cases, appears, we think, from *Boyett v. Hurst,* 54 N. C., 167, and *Nelson v. Hall,* 58 N. C., 32. In the latter case, indeed, the plaintiff, who was an executor, and who was directed by the will of his testator to keep the money invested in good bonds, was not held responsible; but it was, partly, because the sum was very small, only $50, and partly because the principal became insolvent only a few months before the failure of his surety. Here the debt was large, and the principal lebtor made his assignment
(66) more than twelve months, and died several months before the failure of the surety, and before the guardian made the least effort to collect the debt. In the other cases cited by the defendant's counsel, the executors or administrators were not held responsible for the loss of certain debts, but it was because they showed much more diligence in attempting to collect them than can be pretended for this defendant; see *Deberry v. Ivey,* 55 N. C., 370, and *Davis v. Marcum,* 57 N. C., 189.

The exception is overruled, and the Master's report, after being reformed in the manner made necessary by our sustaining one of the plaintiff's exceptions, will be confirmed.

PER CURIAM. Decree accordingly.

HENRY MITCHELL and others v. WILLIAM WARD and another.

Where a sheriff left his county for something over a month, on necessary business, with an intention of returning by a given time, it not appearing that he was insolvent, it was *Held*, that the fact of a deputy having applied a portion of the taxes of a given year to a judgment against him (the sheriff) for the taxes of a preceding year, without being instructed so to do, by the sheriff, was not a sufficient ground for the sureties of that year to have an injunction to *restrain the sheriff from paying the taxes of that year, otherwise than as the law directs.*

APPEAL from an interlocutory order of the Court of Equity of MARTIN.

The plaintiffs allege that they became the sureties of the defendant W. W. Ward on his Sheriff's bond, at October Term, 1859, of Martin County Court; that since then the said Ward had conveyed all his property for the payment of his creditors, and has become insolvent, leaving no indemnity for them, and that he is a defaulter (67) for a large amount; that the said Ward had left the State, and, as plaintiffs believe, did not intend to return; that previously to going off, he placed the tax lists of the county of Martin for the year 1860 in the hands of the other defendant, William J. Hardison, one of his deputies, and that the said deputy, under the direction of the said Ward, was collecting the said taxes of 1860, and applying the money to his (Ward's) private debts, and, in particular, that he had paid $500 of the money thus collected to one D. W. Bagley, the County Trustee, on a judgment obtained against him (Ward) at a previous term of the Court for taxes due of a former year.

The prayer is that they "may be restrained by an order and injunction of this Honorable Court, from applying the money, or any part thereof, received for taxes due the present year to any other purpose, use or benefit than as the law directs"; and that they may be in like manner restrained as to any of the said taxes which they may hereafter collect.

The defendants both answered. Ward denies that he left the State with a view to a permanent removal. He says that, having a very distressing and dangerous disease in his eyes, he left the State on the 12th of April, 1860, for the purpose of obtaining medical aid in the city of New York; that he publicly made known his intention of going, and his purpose in going, and also let it be known that he would return before July Court of that county, but that he did in fact return on 21 May. He admits that he made a deed of trust to secure divers of his creditors, but denies that he is insolvent. He says that, having private claims in the hands of the defendant Hardison, a constable, to the amount of more than a thousand dollars, and also having placed in his hands tax lists for previous years, on the eve of his departure he placed this list for 1860 also in his hands. He says that he owed D. W. Bagley

$500, a balance of a judgment, and that he gave Hardison directions to pay this balance for him, but he did not direct him to pay the amount out of the tax money of 1860, nor did he direct him to pay it
(68) out of any particular funds in his hands. He admits that Hardison told him that he paid it out of the taxes of 1860, but says it was not necessary for him to do so. Hardison gives the same account of this payment, but says it was not necessary that he should have used this particular money, as he could easily have collected from other sources enough to have met the claim.

On the coming in of the answers, the Court ordered the injunction to be dissolved as to Hardison, but to be continued as to Ward to the hearing. From this order, Ward appealed to this Court.

No counsel appeared for the plaintiff in this Court.
Rodman and *Stubbs,* for the defendants.

MANLY, J. We are not aware of any principle of equity by which the continuance of the injunction can be sustained.

The bill alleges that the defendant Ward, Sheriff of Martin County, upon whose bond plaintiffs are sureties, had become insolvent, and left the county not to return; that his tax lists were placed in the hands of a deputy, the other defendant, who was collecting and misapplying the moneys. The answers deny the insolvency and the permanent removal from the county, but admits that the deputy paid a judgment which he had general instructions from his principal to pay, with moneys not applicable to it. The answers both state the judgment was for taxes due the previous year, and the deputy had lists of taxes for both that and the then current year to collect; and the misapplication in question was without authority from the Sheriff.

Upon the coming in of the answers, the injunction was dissolved as to the deputy, but continued as to the Sheriff until the hearing.

Upon this state of the pleadings, the question is, whether the Sheriff will be kept under an injunction not to misapply funds which are
(69) in his sands *virtute officii,* upon an admission of a misapplication in one instance by a deputy, under the circumstances stated.

It seems to us an injunction in such a case can not be sustained, except upon a principle which will justify a resort to a Court of Equity in all cases of public officers to enjoin a fulfillment of their duties; and thus it will be in the power of the sureties, through that Court, to add to the penalties prescribed by the legislative power, for misprison in office, the penalty of contempt of Court. We know of no instance in which such an equity has been recognized by the Courts.

The Sheriff is bound to the performance of his duties under the obligation of an oath, and by other severe pains and penalties, and also by

a strict accountability to others at short intervals. For moneys in his hands withheld from the proper owner or office, he is subject to summary judgments, with penalties. For neglecting or refusing to perform any duty, he is not only subject, generally, to a pecuniary penalty, but is furthermore liable to be indicted as for a misdemeanor, and upon conviction deprived of office, as well as punished according to the common law; Rev. Code, ch. 99, sec. 122; ch. 29, sec. 5; ch. 34, sec. 119; ch. 105, sec. 11.

These are the safeguards which the law has provided for the public, and, in ordinary cases, where no grounds are laid for a receiver and sequestration, they must suffice for the sureties.

The order made below continuing the injunction as to the Sheriff until the hearing, and which was appeal from, should be

PER CURIAM. Reversed.

(70)

RICHARD BLACKNALL v. WILLIAMSON PARISH.

1. Where a paper-writing was signed and sealed by the owner of land, with blanks as to the name of the bargainee and left with an agent, who was authorized, by parol, to fill up the blanks with the name of the purchaser and the price, it was *Held*, that, though such an instrument could not operate as a deed, yet, it was a contract for the sale of land, signed, for the person to be charged therewith, by his lawfully authorized agent, and could be specifically enforced.
2. A memorandum or note of a contract may be signed by one in the name of his principal, so as to comply with the requisitions of the statute of frauds, without being thereunto authorized in writing.

CAUSE removed from the Court of Equity of ORANGE.

This was a bill filed for the specific performance of a contract, by which the defendant bound himself to convey to the plaintiff a tract of land, described by its metes and bounds, and lying in Orange County. The allegations in the bill (which are sustained by the evidence filed) are that the defendant, being about to remove from the county of Orange, where he lived, to the western part of the State, authorized one Harrison Parker to sell for him the land in question, and to enable him to do so he prepared a deed, describing the premises, and purporting to convey the same in fee, but leaving therein blanks as to the name of the bargainee and the price, with instructions, when he might make sale of the land, to fill up the blanks in the deed and deliver it to the purchaser; that afterwards, Parker made a sale to the plaintiff, at a reasonable price, and, accordingly, filled up the deed in the requisite particulars, with the name of the plaintiff and with the price, both supposing the instrument was thus made good as a deed; that Blacknall gave his bond for the money to the defendant's agent, who used the same in

the purchase of a slave for the defendant, and it was subsequently paid to defendant's assignee.

The prayer of the bill is for a specific performance of the contract evidenced by the imperfect deed, and to stay, by an injunction, the proceedings of an action of ejectment, which the defendant had
(71) brought against the plaintiff, and which was then pending in the Superior Court of Orange County.

The defendant answered, denying the authority of Parker to sell to Blacknall, and alleging that he had special objections to plaintiff's having the land, which are stated; and that the deed in question was prepared for the purpose of consummating a sale to one Hopkins, with whom he was in treaty when he left the county, and that his agent had no authority to deliver it to any one else. He relied on the statute of frauds as a bar to the plaintiff's equity.

On the coming in of the answers, the injunction, which had issued in vacation, was dissolved, and the bill continued over as an original bill. Proofs were taken which sustained the plaintiff's allegations and disproved those of the defendant. The cause being set for hearing, was transmitted to this Court by consent.

Norwood, for the plaintiff.
Graham, for the defendant.

BATTLE, J. Upon examination of the testimony taken in this cause, we are entirely satisfied that the land mentioned in the pleadings was contracted to be sold to the plaintiff by an authorized agent of the defendant; that the authority under which the agent acted, was by parol, and that the contract was entered into by the agent's filling up certain blanks in an instrument, which the defendant had signed and sealed, and left with the agent to be by him made complete by filling up such blanks and delivering it as the deed of the defendant to the person who should become the purchaser. We are further satisfied that what was intended to be a sale was made fairly, and for a price which, at the time, was not inadequate, and further, that the price was, subsequently, received by the defendant.

It has been properly admitted by the plaintiff that the instrument which was delivered to him by the agent of the defendant as a deed for the land in question, could not operate as such, because it was not
(72) complete when it was signed and sealed by the defendant. In *Davenport v. Sleight,* 19 N. C., 381, and again in *Graham v. Holt,* 25 N. C., 300, it was held that an instrument signed and sealed in blank, and handed to an agent, only verbally authorized to fill up the blank and deliver it, was not the bond of the principal, and that after declarations of the principal approving of the delivery of the agent, made in

the absence of the instrument, and without any act in relation to it, would not amount to an adoption and ratification of the delivery.

The case before us is one of a deed for land, instead of a bond for the payment of money, but the principle is the same. The instrument must be complete before it can be delivered by an agent, acting under a mere parol authority, as the act and deed of his principal.

The plaintiff, not being able to set up a legal title under the instrument in question, insists, nevertheless, that it is evidence of a contract, the specific performance of which he has a right to have enforced in a Court of Equity. The defendant objects to this, and relies, in support of his objection, upon the statute of frauds, which declares "that all contracts to sell or convey any lands, etc., shall be void and of no effect, unless such contract, etc., or some memorandum or note thereof, shall be put in writing, signed by the party to be charged therewith, or by some other person by him thereunto lawfully authorized," etc.; Rev. Code, ch. 50, sec. 11. The question, then, is, *first,* whether the contract for the sale of the land was put in writing; and, *secondly,* was it signed by the party to be charged therewith, or by any person by him thereto lawfully authorized. We think that there can be no doubt that the instrument, which, for the reasons above stated, could not operate as a deed, may be regarded as a contract put in writing. It is, in truth, a written contract more than ordinarily complete, both in form and substance, and the only question admitting of any sort of doubt, is whether it has been signed by the defendant, or by any legally authorized agent. We are of the opinion that it can not be considered as a contract with the plaintiff, signed by the defendant himself, independ- (73) ently of any act of his agent, because, when the defendant put his name and seal to it, no such contract had been made. But we think that, in legal effect, it was signed for him, and in his name, by his properly constituted agent. The failure of the agent to make the instrument operate as the deed of his principal, did not prevent him from causing it to operate as the simple contract of his principal; for nothing is more common than for an agent to fill up blanks in a promissory note signed by his principal, and nobody has ever doubted that the principal was bound by it. That the authority of the agent, in all such cases, may, under the statute of frauds, be by parol, is well settled; 1 Parsons on Cont., 42; 2 Kent's Com., 612; *Coles v. Trecothic,* 9 Ves. Jun., 250.

The plaintiff is entitled to a decree for a specific performance, and also to recover back all the costs which he has been compelled to pay in the action of ejectment at law, and also the costs which he has had to pay upon the dissolution of the injunction in the Court of Equity below; to ascertain which, an account may be ordered.

PER CURIAM. Decree accordingly.

Cited: Magee v. Blankenship, 95 N. C., 569; *Cadell v. Allen,* 99 N. C., 545; *Smith v. Browne,* 132 N. C., 368; *Rollins v. Ebbs,* 138 N. C., 149; *Flowe v. Hartwick,* 167 N. C., 452.

Dist.: Loftin v. Crossland, 94 N. C., 85.

ISAAC W. HUGHES v. R. W. BLACKWELL and others.

1. Where a plaintiff in his bill makes direct charges, and calls upon the defendant by special interrogatories to make discoveries as to those charges, the answer, directly responsive to such interrogatories, becomes evidence for the defendant, as well as against him, notwithstanding that a replication to the answer had been put in.
2. The payment of interest upon a mortgage debt within ten years before the filing of a bill to foreclose, repels the presumption of payment or abandonment arising from the length of time.

(74) CAUSE removed from the Court of Equity of CRAVEN.

On 23 August, 1844, John Blackwell conveyed, by way of mortgage to the defendants, R. M. Blackwell, Zophar Mills and John D. Abrams, the property which is the subject of this controversy, lying in the town of New Bern, to secure a note of that date for $6,000, made by the said John Blackwell and one John M. Oliver, and on the same day the said John Blackwell executed another mortgage deed for the same property, to secure a debt of $1,943.34, due on an account. On 1 July, 1845, the said John Blackwell executed a mortgage deed to R. M. Blackwell for the same property, to secure a note payable to him for $3,500, bearing even date with the said mortgage deed, and due two years after date with interest from the date. In September, 1856, the said John Blackwell executed a deed of trust to James C. Justice, as trustee, to secure to the plaintiffs a large amount of debts due them, in which said deed are embraced the premises in question. In the spring of 1857, a bill of foreclosure was filed by the said R. M. Blackwell and Zophar Mills and John D. Abrams, and the said R. M. Blackwell, to have the said debts paid and satisfied by and through the means of the said mortgage, and pending the proceedings thereon, the bill in this case was filed by the plaintiffs to set aside the mortgage deeds upon several grounds, the one of which that has come under the consideration of this Court more particularly is, that from the length of time elapsing between the day the said notes became due and the time of bringing the bill to foreclose, the presumption of payment, satisfaction or abandonment arose. The plaintiffs, anticipating that the defendants would set up the payment of a part of the principal or interest within the ten years, in order to repel the presumption otherwise arising upon the

efflux of that period, among divers other special interrogatories, ask the defendants as follows: "Did John Blackwell pay any money for interest on the said several notes and accounts? If so, when? How much? Who was present? Where was the payment made? How made? Were they endorsed as credits? If so, in whose handwriting? By whose authority and in whose presence?" To these interroga- (75) tories, the defendants, R. M. Blackwell, Mills and Abrams, answer as follows: "And the said defendants, Robert M. Blackwell, Zophar Mills and John D. Abrams, further answering the said interrogatories as to the payment of interest on the said several notes and accounts, say: Subsequently to the receiving of the said mortgage deeds they had large dealings with the said John Blackwell and John M. Oliver, consisting of sales of merchandise in the city of New York, belonging to the said John Blackwell and said Oliver, and half yearly, on the first days of July and January in each year, these defendants rendered accounts current, in which were regularly charged the interest on said several notes and accounts, and said interest was thus regularly paid up to 31 December, 1849. And they further answer that the said interest so paid was not regularly endorsed as credit on said notes and account, but, according to their best recollection, endorsements were made on said notes, showing that the interest had been paid previous to a transfer of them to James M. Blackwell, as truetee, etc.; but said notes now being in their possession, or accessible by these defendants, they can not answer positively as to that matter; nor do they remember in whose handwriting such endorsements are, but they believe they were made by one of these defendants (probably by R. M. Blackwell), or by their authority."

On the production of the notes in evidence, the following endorsement appears on that for $6,000, to wit:

"Received the interest on the within note up to 20 September, 1854.
R. M. BLACKWELL & Co."

And on that for $3,500, the following, to wit:

"Cr. the within note by seven hundred and thirty-five dollars, received through John Blackwell & Co., being three years' interest on within note up to 1 July, 1848, this 20 April, 1848.
R. M. BLACKWELL."

The main question was, whether the facts disclosed in the answer, being thus specifically called out by interrogatories, did not become evidence in the cause, notwithstanding plaintiff's repli- (76) cation.

J. W. Bryan and *Haughton,* for the plaintiffs.
Fowle, Green, McRae and *E. G. Haywood,* for the defendants.

BATTLE, J. The debts alleged to be due from the defendant John Blackwell to the defendants R. M. Blackwell, Mills and Abrams, for the security of which the mortgages which the plaintiffs seek to set aside, were given, are clearly proved to be fair and *bona fide* debts, founded upon sufficient and valuable considerations. The plaintiffs virtually admit the truth of this, but they allege that the debts have been paid and the mortgages satisfied and abandoned. In support of their allegations, they rely mainly upon the clearly established fact that after the mortgages in question were executed, John Blackwell, the mortgagor, remained in possession of the mortgaged premises for more than ten years, and, as the plaintiffs state, without the payment of any part of the principal or interest of the debts to the mortgagees, or either of them, and without the acknowledgment of the existence of the debts within that time. The plaintiffs insist, therefore, upon the presumption of law that the debts have been paid, and, consequently, that the mortgages themselves have been satisfied and abandoned. If all these allegations be true, the legal consequence contended for by the plaintiffs is clearly established by the authorities cited by their counsel. See among others, *Lyerly v. Wheeler,* 38 N. C., 599, and *Roberts v. Welch,* 43 N. C., 287. But the defendants deny the statement that no part of the interest due on these debts has been paid, and, on the contrary, aver that it was regularly paid every year, until 1848. They state the manner in which the payments were made, and produce the bonds mentioned in the pleadings, of $6,000 and $3,500, with an endorsement on each in the handwriting of R. M. Blackwell, of a certain amount of
(77) interest paid thereon. The account for $1,943.34, which is one of the debts mentioned in and secured by one of the mortgage deeds, is also produced; upon which there is no endorsement of the payment of interest, but the defendants aver positively that the interest was paid on that also, as well as one the bonds, up to the time mentioned above. If these allegations of the defendants be true, then the same authorities to which we have already referred show that the presumption for which the plaintiffs contend is rebutted. The question then arises: Are they sufficiently proved, so that the Court can declare them to be true? The defendants contend that they are fully and sufficiently proved by their direct and positive answer to special interrogatories put to them by the plaintiffs upon these very points; and that the plaintiffs have not shown anything to repel the force of the evidence thus furnished by the answer. In support of this position, the defendants rely upon 2 Stor. Eq., sec. 1528; 2 Fonb. Eq. B, 6, ch. 2, sec. 3, note g; *Pember v. Mathers,* 1 Bro. Ch. Cases, 52, and *Chaffin v. Chaffin,* 22

N. C., 255. The plaintiffs deny the application of the rule to the present case, because, they say, that the allegation of the defendants with regard to the payment of interest on the debts was denied by the replication put in to the answer; that such allegation was a matter of defense set up by the defendants, which they were bound to prove by testimony, and that their answer, being thus denied by the replication, was not evidence for them. For this is cited *Lyerly v. Wheeler,* 38 N. C., 170 and 599, and it is also supported by *Gillis v. Martin,* 17 N. C., 470. The plaintiff's position would have been completely sustained if they had not made statements in their bill with regard to the payment of interest on the debts, and called upon the defendants by special interrogatories to answer them. They thereby made the defendants witnesses as to that fact, and the answer was thus made evidence for the defendants, as well as against them. This is shown by *Lyerly v. Wheeler,* cited and relied upon by the plaintiffs themselves. In that case, at page 601, the Court says: "An answer after replication is not evidence for the defendant, except as it is made so by (78) discoveries called for in the bill, and which are responsive to direct charges or special interrogatories." The other authorities which have been already referred to as being relied upon by the defendants, are to the same effect. Had the plaintiffs made no charges in their bill about the non-payment of interest, and asked no questions upon the subject, but simply stated the time when the bonds were given and the mortgages executed, and then relied upon the lapse of time, as affording a presumption of the payment of the debts and a satisfaction and abandonment of the mortgages, the defendants would have been compelled to allege such payment in their answer as a fact, going to repel the presumption, and then, upon a replication being put in, their answer would not have been evidence for them, and they must have failed in their defense, unless they could have produced proofs independent of their answer. These observations do not apply to the debt and mortgage for $3,500, because the bond was payable two years after its date, in 1845, which brought it within the ten years before the bill for foreclosure, mentioned in the pleadings, was filed. As the only object of the bill was to set aside the mortgages, and as no account is prayed from the defendant Justice, the trustee, it has failed of its purpose, and must be

PER CURIAM. Dismissed with costs.

Cited: Jackson v. Spivey, 63 N. C., 263; *Longmire v. Herndon,* 72 N. C., 631.

(79)

WILLIAM H. JOYNER, Adm'r, and others, v. THOMAS H. CONYERS, Adm'r., and others.

1. Where an executrix procured an order of court to sell certain slaves, in which she was willed a life-estate, upon a suggestion that such a sale was necessary for the payment of the debts of her testator, and in a short time after the sale she took conveyances from the purchasers, for the same slaves, without ever having been out of possession, it being also made to appear that there were no debts of the estate unpaid at the time of the orders to sell, it was *Held*, that the executrix took nothing by her purchase, and should be declared a trustee for the remaindermen.
2. Damages assessed against a railroad company, on the condemnation of land to the use of the company, belong to the tenant for life and remainderman, in proportion to the period for which each suffers the incumbrance.

CAUSE removed from the Court of Equity of FRANKLIN.

Thomas Y. Richards, who died in 1831, by his will, devised and bequeathed as follows: "I lend to my sister, Polly Richards, the tract of land whereon I now live, and six negroes, named Sam, Jerry, Amy, Hinton, Lucy and Lavinth, together with my stock of every description, during her lifetime, and after her death, I give to my nephew, John W. Womath, five hundred dollars, to be raised out of the estate, and the balance of which estate I will and bequeath to the bodily heirs of my five sisters, that is, Frances Duke (who is now dead), Martha Bowers, Rebecca Hefflin, Nancy Blacknall and Sally Conyers, to be equally divided among said heirs, with this exception, that I give and bequeath to my nephews Thomas Bowers and Thomas Conyers, one horse apiece, worth seventy-five dollars, more than the rest of said heirs, forever." Polly Richards was appointed the sole executrix in the said will, and she qualified and took upon herself the burden of executing the trusts therein. By a former suit in equity between the plaintiff W. H. Joyner, administrator *de bonis non* of the estate of Thomas Y. Richards, and the other persons who are parties to this suit, a decree was passed declaring that all the children of the five sisters of the testator, after the death of Polly Richards, and after deducting a legacy of $500 to John Womath, were entitled to have the said property equally divided among them *"per capita,"* with the exception of the two horses to Thomas H. Conyers and Thomas Bowers.

The said Polly Richards entered upon the land on the death of her brother, the testator, and took charge of the slaves and other property. The perishable property was sold by her for payment of debts, and afterwards, under a special order of the County Court, at March
(80) Term, 1832, of Franklin County, on a suggestion that a further sale of property was necessary to pay debts, a girl by the name of Lucy (named in said order) was sold to one Archibald Yarborough

for $134, and afterwards, another special order of the Court was obtained at March Term, 1834, upon a like suggestion, for the sale of another slave, by the name of Peggy, which slave was sold accordingly to Sarah Conyers, for $130. Both of these negroes remained with the executrix, and possession of them was never demanded of her, nor taken by the purchasers, but each of them, shortly after these sales, formally executed titles to her, the said Polly Richards. Since then she claimed the said slaves as her own up to her death, which took place in 1855.

The plaintiffs, who are the remaindermen, allege that neither of these sales of Lucy or Peggy was demanded by the condition of the estate of Thomas Richards, for that the property first sold by her was sufficient to pay all the debts of the estate, and they charge that such sales were mere devices, concerted with the said Archibald Yarborough and Sarah Conyers, whereby it was agreed that they should respectively bid off the negroes offered for sale, and should each convey the same back to the said Polly Richards, by which devices she attempted to acquire a full estate in the said female slaves, in which before she had only a life interest.

The bill further alleges that the sum of $150 was recovered for damages to the land in question, from the Raleigh and Gaston Railroad Company, the track of said road being located upon a part of the land devised to the said Polly for life, as above stated, and that she received and used the whole amount of said damages, and the plaintiffs insist that they are entitled to a share of that sum, in proportion to the amount of damage done to their estate in remainder.

The bill sets forth that the said Polly Richards cut down and sold timber to the Raleigh & Gaston Railroad Company, which was not merely taken off in the necessary course of working the land, but that the timber was cut for the express purpose of being sold, and (81) amounted to waste.

The prayer of the bill is that the said slaves, Lucy and Peggy, and their increase, may be decreed to be delivered up to the plaintiff W. H. Joyner, the administrator *de bonis non* of Thomas Y. Yarborough, that the same, with the hires of the said slaves since the death of Polly Richards, may be divided among the plaintiffs according to the provisions of the will, and for that purpose, that a sale of the said slaves shall be ordered, and an account of the hires. The bill further prays for a proportionate share of the land damages and a compensation for the damage and waste done to their estate in remainder.

The answers being by persons in their representative characters, do not affect the questions involved.

At December Term, 1859, this Court ordered an account of the estate of Thomas Y. Richards in the hands of his executrix, Polly Richards, to

be taken by the Clerk of this Court, and at the present term, Mr. Freeman reported "that on 21 March, 1832, when the girl Lucy was sold, the executrix had assets more than sufficient to pay the debts of her testator, together with all the expenses attending the same, and also that on 8 September, 1834, when the girl Peggy was sold, she had more than sufficient to pay the debts of her testator."

There was replication to the answer and proof taken, and the cause was set down for hearing on the bill, answer, exhibits and former orders, and sent to this Court.

J. J. Davis and *W. F. Green,* for the plaintiffs.
Eaton, for the defendants.

MANLY, J. When this cause was under the consideration of the Court at December Term, 1859, the sale by the executrix, Polly Richards, of the girl slaves, Lucy and Peggy, and the buying them back again in a short time afterwards, was of so suspicious a character, that an account was ordered of the assets of the estate, that we might see whether
(82) the sale was necessary to pay the debts. The report of the Clerk, at this term, negatives the supposition that it could have been for the purpose of raising assets to pay debts. The assets in hand were already abundantly sufficient for that purpose. It could have been, therefore, only for the purpose of changing the title. As the executrix was to have a life estate in these girls, with an interest in remainder limited over, she had a motive for desiring to change the estate which she held. No form of a sale without necessity, under the influence of such a motive, could effect her object; the estate remained the same.

The facts of the case, and especially the significant one disclosed by the report of the Clerk, constrain us to hold the sale of both the slaves, Lucy and Peggy, inoperative and void. They and their offspring must be accounted for and surrendered to the administrator *de bonis non* of Thomas Y. Richards, to be accounted for by him to the persons entitled in remainder.

There must also be an account of the hires of the slaves since the death of Polly Richards.

With respect to the damages recovered by Polly Richards, the tenant for life of the land, from the Raleigh and Gaston Railroad Company, we are of opinion the plaintiffs are also entitled to an account. By the condemnation of the land, under the provisions of the charter of the road, the company acquired an easement in the same for ninety-nine years. The $150 assessed as damages were not assessed, we take it, for the injury done alone to the life estate, but to the estate in remainder also. The persons, therefore, in remainder are entitled to a part of this fund, viz., such an amount of the same as will be proportional to the

period of time for which they suffer the incumbrance. This, we mean, is the general rule applicable to cases of this sort. There may be special cases in which other elements will properly enter into the calculation; as, for instance, the special location of the road might affect, materially, the calculation of relative damage. If it ran through the yard of the tenant for life, the rule would not do the tenant full justice, (83) while if it went through a remote woodland, it would do more justice. It is referred to the Clerk to enquire and report to what part of this sum of $150 the persons in remainder are entitled.

It is also alleged that there was a waste of the land by the tenant for life by cutting timber not needed for the estate, but which was cut for market. The Clerk may make enquiry into this matter also, and report results.

PER CURIAM. Decree accordingly.

HENRY S. CLARK v. DAVID LAWRENCE, Trustee.

1. Whenever it can be clearly proved that a place of sepulture is so situated that the burial of the dead there will endanger life or health, either by corrupting the surrounding atmosphere, or the water of wells or springs, a court of equity will grant injunctive relief.
2. Where a bill was filed, praying to have a nuisance abated, and for an injunction to restrain the defendant from erecting it in future, and the act complained of was of the character of a nuisance, but the testimony was not sufficient to satisfy the court that it amounted to a nuisance in the particular case, the court directed an issue to be tried in the superior court to determine the fact.

CAUSE removed from the Court of Equity of PITT.

The bill is filed to obtain an injunction to restrain the defendant, who is the trustee of the Baptist congregation in the town of Greenville, from permitting the churchyard to be used as a cemetery.

The lot in question adjoins the lot upon which the plaintiff's dwelling house is situated, and was purchased by the Baptist congregation about 1827, the plaintiff's lot being at the time unoccupied and unimproved—there being no house upon it until 1845. At the time the plaintiff purchased his lot, which was in 1850, there were only two graves (84) on the lot in question, and these were in the part most remote from his dwelling.

In December, 1857, there were two burials of dead bodies on this lot, about three feet from the boundary line of the plaintiff's lot, and about thirty-five feet from one well, and seventy-two from another, from which he supplied himself and family with water. These dead bodies were deposited in wooden coffins, and buried to a depth of three or four

feet, and in one case the grave was lined at the bottom and up the sides with brick and cemented. The soil was of a mixture of clay and sand, and the ground sloped from the graves towards the plaintiff's wells, which, together with his dwelling house, were situated in a northerly direction from the graveyard. The bill alleged that this situation exposed himself and family to the effluvia arising from decaying bodies, and which the south winds that generally prevail in summer, will bring directly into his house, by which the health of plaintiff's family and the value of his lot will be irreparably injured. The bill further alleges that the quality of the water in plaintiff's wells has been so impaired by their close proximity to these graves, as to render them unfit for use. This fact is denied by the answer. There was evidence to show that the water in the plaintiff's wells had formerly been good, but that it is now very bad.

There was much other testimony, which, in the view taken by the Court of this case it is not deemed necessary to set out.

The cause being set down for hearing upon the bill, answer, exhibits and proofs, was transferred to this Court by consent.

Rodman, Shaw and *J. H. Bryan,* for the plaintiff.
Donnell, for the defendant.

BATTLE, J. The jurisdiction of the Court of Equity to restrain by an injunction the erection or continuance of a nuisance, either
(85) public or private, which is likely to produce irreparable mischief, is well established. It is equally well settled that the destruction of, or injury to the health of inhabitants of a city or town, or of an individual and his family, is deemed a mischief of an irreparable character. In the case of a city or town, where the apprehended injury is clearly proved, the Court will not hesitate to grant the injunction, even against the erection or continuance of a water grist mill, though such mills are generally deemed of public benefit, and the building of them has been encouraged and protected by our statute law. See *Attorney-General v. Hunter,* 16 N. C., 12; *Attorney-General v. Blount,* 11 N. C., 384. In the case of a private nuisance, caused by a mill pond, the Court will interfere, indeed, but with more caution and hesitation, both because the public benefit arising from the mill is opposed to the private interest of an individual, and because where the land of the individual is overflowed, as in most cases it will be, and the damages assessed by a jury therefor exceed twenty dollars, the party may, at law, by repeated actions, compel an abatement of the nuisance; *Eason v. Perkins,* 17 N. C., 38; *Barnes v. Calhoun,* 37 N. C., 199. See also *Spencer v. R. R.,* 8 Simons, 193.

The same principle which would excite into activity the restraining

power of the Court, where the health of the community, or of an individual member of it, is in danger of being destroyed or impaired by a mill pond, will be equally ready to interpose its protection when a similar danger is threatened from the establishment of a cemetery in a city or town, or very near the dwelling house of a private person. This, we think, was recognized in *Ellison v. Commissioners,* 58 N. C., 71, though the decision in that case, on account of its peculiar circumstances, was averse to the application for the injunction. In cases of this kind, the plaintiff will not have to encounter the difficulty that a place for the burial of the dead, within the limits of a city or town, or near the residence of a private person in the country, is considered a (86) matter of public weal. On the contrary, the public sentiment is already, or is becoming to be in favor of more secluded spots, where we, like the Patriarch of old, "may bury our dead out of our sight." Whenever, then, it can be clearly proved that a place of sepulture is so situated that the burial of the dead there will endanger life or health, either by corrupting the surrounding atmosphere, or the water of wells or springs, the Court will grant its injunctive relief upon the ground that the act will be a nuisance of a kind likely to produce irreparable mischief, and one which can not be adequately redressed by an action at law. In the present case, the evidence upon which the cause has been brought before us for a hearing, does not so clearly satisfy us of the fact of a nuisance, either existing or apprehended, as will justify us in granting an injunction without further inquiry. Under such circumstances, the usual course is to require the party to establish his allegations of a nuisance by an action of law; *Simpson v. Justice,* 43 N. C., 115, and the cases there cited. That course would be most appropriate, and would be adopted by us, if, as was said in the *Attorney-General v. Hunter, ubi supra,* "the right infringed were of a doubtful character, as the right of view over another's ground." But, in a case like the present, where the thing complained of is certainly of the character of a nuisance, and the only doubt is whether the testimony proves that it is so, in the particular case, we think that we can accomplish the same purpose in a manner more convenient to the parties, and quite as satisfactory to ourselves, by directing an issue to be tried in the Superior Court of Law for Pitt County, whether the burial of the dead in the church lot mentioned in the pleadings has produced, or, if continued, is likely to produce, sickness in the plaintiff's family, or to impair their comfort, either by corrupting the air or the water in his wells. Let an order be drawn accordingly.

PER CURIAM. Decree accordingly.

Cited: Frizzle v. Patrick, post, 357; *Redd v. Cotton Mills,* 136 N. C., 344; *Cherry v. Williams,* 147 N. C., 457.

(87)

JONATHAN D. ROUNTREE v. WILLIAM McL. McKAY, Trustee, and others.

1. Where a bill was filed by a judgment creditor against a trustor and his trustee, to have satisfaction of his judgment out of the resulting interest of the trustor, alleging that the debtor had not a legal title to any property whatsoever, and that the interest sought to be subjected was one which only could be reached in a court of equity, it was *Held*, not to be necessary to state that the plaintiff had taken out a *fi. fa.* on his judgment, and that the same was returned *nulla bona*.
2. Where a bill was filed by a judgment creditor to subject the resulting interest of the trustor in personalty, and it appeared that other judgment creditors, as well as plaintiff, had levied *fi. fas.* on the trustor's interest in the land conveyed in the deed of trust, it was *Held*, that such other judgment creditors were necessary parties to the bill.
3. Where an objection, for the want of parties, was taken *ore tenus*, for the first time, on the argument of the demurrer in this court, which was deemed valid, the court refused, nevertheless, to dismiss the bill, but remanded it without costs to the court below, that it might be amended as to parties.

THIS was an appeal from a decree of the Court of Equity of WILSON, overruling a demurrer.

The plaintiff, Jonathan Rountree, recovered against John Waddill, Jr., and Thomas Waddill, a judgment in this Court, at its December Term, 1859, for $7,587, with interest and costs. The plaintiff alleges in his bill that defendants have no legal title to any property whatever, out of which their judgment could be satisfied, but that they have an equitable interest in a very large property, which they conveyed to the defendants McKay and Fuller, as trustees, to secure other creditors; that said property consists of land and personal estate; that the deed of trust has been standing ever since February, 1858, during which time the trustors, the Messrs. Waddill, have had the possession and use of the property, and by such use have paid off a considerable portion, at least one-half, of the debts secured, and that if it had not been for the plaintiff's judgment, they do not believe that there would have been any sale of this property, but that since the rendition of this judgment, the trustees have proceeded to advertise a sale of all the property

(88) conveyed to them. The bill alleges further, that a writ of *fieri facias* on the plaintiff's judgment has been levied on the trustors' interest in the real estate conveyed, and that several other judgment creditors have also levied executions on this resulting interest in the real estate, and he does not believe it will sell for enough to satisfy the plaintiff's judgment.

The prayer is, that the plaintiff's judgment may be satisfied out of the resulting interest of the trustor in the personal estate, and to that end, that the defendants may set forth the several debts mentioned in the deed of trust, which have been satisfied, and the names and amounts

of those not satisfied, also the notes and accounts conveyed to them in the said deed of trust, and a detailed statement of all the assets now on hand. The prayer is, further, that the trustees may be decreed at once to make sale of the property and pay off the debts secured, and that any balance that may be in their hands may be applied to the payment of the plaintiff's judgment.

The defendants demurred, for the cause that the bill does not set forth that the plaintiff had taken out a *fieri facias,* and had the same returned by the Sheriff *nulla bona.* On the argument here, the defendants' counsel assigned, *ore tenus,* a further ground of demurrer that the creditors mentioned in the bill as having had their executions levied on the trustor's interest in the real property conveyed in trust, were not made parties to the bill.

The Court below overruled the demurrer and ordered the defendants to answer, from which ruling the defendants appealed.

Strong and *J. H. Bryan,* for the plaintiff.
Neill McKay and *Fowle,* for the defendants.

BATTLE, J. The particular ground on which the demurrer is based, to wit, that the plaintiff has not set forth in his bill that he has issued an execution against the defendants to his judgment at law, and had a return by the Sheriff of *nulla bona,* can not be sustained. The bill alleges expressly that these defendants had not the legal title (89) to any property whatever, and the only interest which they owned which could be made liable to the satisfaction of the plaintiff's debt, was one which could be reached only in a Court of Equity. This is sufficient, without the allegation of the fact, for the want of which the defendants have demurred, as is clearly shown in *Tabb v. Williams,* 57 N. C., 352.

If the objection insisted upon in the demurrer were the only one which could be taken to the bill, we should, of course, overrule it, and at once require the defendants to answer. But their counsel have insisted here, for the first time, by a demurrer *ore tenus,* upon a defect in the bill for the want of parties, in that the creditors, who, the bill states, had obtained judgments against the defendants J. and T. Waddill, and caused executions thereon to be levied on their resulting interest in the real estate conveyed to the other defendants, as trustees are necessary parties in taking the account prayed for in the bill. These creditors, we think, are necessary parties, because they are interested in having the creditors secured by the deed of trust paid out of the proceeds of the personal estate, so as to leave a larger surplus of the real estate, or its proceeds, for the satisfaction of their executions, while it may be to the interest of the plaintiff to have the trust creditors paid out of the real estate, in order to leave a larger surplus of personal property to satisfy

his debt, and the defendants are all interested in having the conflicting claims of the plaintiff and the other judgment creditors adjusted in one suit.

The demurrer *ore tenus* for the want of parties must, then, be sustained; but the effect will not be to have the bill dismissed, but to have it remanded, without costs, in order that the plaintiff may amend his bill by making the necessary parties; see *Caldwell v. Blackwood,* 54 N. C., 274. An order to this effect may be drawn accordingly.

PER CURIAM. Cause remanded.

Cited: Carr v. Farrington, 63 N. C., 562.

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(90)

JAMES HUNT and wife and others v. CHARLES FRAZIER and others.

1. Courts of equity do not assume jurisdiction to reform deeds unless the transaction be based on a valuable or meritorious consideration.
2. Where A had loaned B, his brother, a sum of money, and taken a conveyance of a tract of land, and some slaves as security for the repayment, and the two brothers came to an agreement that A should convey the property to D on certain trusts, to let B's wife and children live upon the land and enjoy it for the life of the mother, and then to be sold for the payment of A's debts, and the overplus to be paid to her children, it was *Held,* that the deed of trust was founded on a valuable consideration, and as such the court's power to reform its defects could be properly exercised.

CAUSE removed from the Court of Equity of GRANVILLE.

The bill is filed to obtain a decree for reforming a certain deed from one William Hunt to Portius Moore, which deed is in the following words:

"This indenture, made and entered into this 27 November, 1838, between William Hunt, of the county of Granville, and State of North Carolina, of the one part, and Portius Moors, of the county of Person, and State aforesaid, of the other part, witnesseth: That for and in consideration of the sum of one thousand dollars, to him secured to be paid, the said William Hunt doth hereby bargain and sell to the said Portius Moore a certain parcel or tract of land lying in the county of Granville, and State aforesaid, and on the waters of Grassy Creek, bounded as follows (setting out the boundaries), containing two hundred and twenty-four acres, more or less. Also, the following negroes, to wit, Margaret, otherwise called Peggy, about the age of thirty-six or seven, and two children, Rody, of the age of six or seven, and Charles, of the age of five, the title of the aforesaid land and negroes, I, the said William Hunt, doth hereby warrant and defend to the said Portius Moore,

his heirs and assigns forever, in trust for the following purposes, to wit, that the said Portius Moore is to manage said land and negroes in the best manner that he can, for the benefit of Lucinda Hunt and her children, and is at all times to furnish said Lucinda Hunt (91) out of the proceeds of said land and negroes, if sufficient, a comfortable support, and the balance, if any, to pay over to the said William Hunt, until the above named sum of one thousand dollars, with the interest thereon, shall have been paid; and the said William Hunt doth further retain to himself the right of tending such part of the plantation as may not be wanted for cultivation by the family, and after the said sum of one thousand dollars, with the interest thereon, shall have been paid, then the said privilege shall cease, then the said William Hunt doth hereby warrant and defend the said title of the said land and negroes, and their increase, to the said Moore, in trust for the benefit of the said Lucinda Hunt and her children. In witness whereof, I have set my hand and seal, this date above written.

"In presence of: WILLIAM HUNT. (Seal.)
WILLIAM B. FRAZIER.
DENNIS O'B. FRAZIER."

At the same time, William Hunt took from the trustee, Moore, the following bond:

"Know all men by these presents, that I, Portius Moore, of the county of Person, and State of North Carolina (trustee for Lucinda Hunt), am held and firmly bound unto William Hunt, of the county of Granville, and State aforesaid, in the sum of one thousand dollars, which payment well and truly to be made, I bind myself, my heirs and assigns. In witness whereof I have set my hand and seal, this 27 November, 1838.

"The condition of the above obligation is such, that whereas, the above named William Hunt hath this day conveyed to the above bound Portius Moore, a certain tract of land and three negroes, as named in the deed and bill of sale (in trust for the benefit of Lucinda Hunt and her children), the proceeds of which is to be applied to their use, so as to furnish them with a comfortable support, and the balance, if any, to pay the said William Hunt, in each and every year, until the sum of one thousand dollars, with the interest thereon, shall have (92) been paid, then the above obligation shall be void, otherwise to remain in full force and effect. Given under my hand and seal, the date above written. PORTIUS MOORE. (Seal.)"

The plaintiffs in this bill are the heirs-at-law, children and grandchildren of Lucinda Hunt, and the defendants are the heirs-at-law of Portius Moore and William Hunt, and the prayer of the bill is to have

the deed from William Hunt to Moore reformed by inserting words of inheritance, which, it alleges, were omitted through the ignorance and want of skill in the draftsman. The plaintiffs have continued in the possession of the lands and slaves in question from the date of this deed down to the present time. Portius Moore died in the year 1849, and William Hunt in the year 1853, and there was no evidence that he ever claimed the land after the death of Moore.

William Hunt and James Hunt, the husband of Lucinda Hunt, were brothers, and at the time the above recited deed was made, William Hunt was unmarried, and about fifty years of age. The property conveyed in the deed had originally belonged to James Hunt, and had been conveyed to the said William, together with the slaves, as security for the said sum of one thousand dollars, and a witness who was present at the time the deed was executed stated that the understanding was that Lucinda Hunt should executed to William Hunt a bond for $1,000, and was to retain the land until the debt was paid.

The defendants, in their answer, resist the prayer of the bill upon the ground that there is no evidence that William Hunt meant to convey more than a life estate to the trustee, Moore, and because, as they allege, there was no consideration for this deed.

By an amendment to their answer, defendants set out that in the year....., some of the negroes in question were levied on under an execution against James Hunt, and sold, whereupon, the trustee, Moore, brought an action against the purchaser to recover them back; (93) which action Moore, after taking a bond of indemnity from William Hunt, and Lucinda Hunt compromised by agreeing to pay $366.48, which money was paid by William Hunt. The defendant claimed to have this sum added to the $1,000, and have the land declared a security for the whole sum in case the Court should decree a reformation of the deed. The cause being set for hearing upon the bill, answer, exhibits and proofs, was transferred to this Court by consent.

Fowle, for the plaintiff.
Moore and *Reade,* for the defendant.

PEARSON, C. J. It was the intention of the parties to vest in Moore a fee simple estate. This is clear from all the circumstances of the case. The warranty is to Moore and "his heirs." The bond of Moore binds "his heirs" for the performance of the trust, and, indeed, the purpose of the parties, and the trust set out in the deed, made it necessary to give to the trustee the legal estate in fee. So the omission of the word "heirs" in limiting the legal estate was the effect of accident, or occurred through the ignorance or mistake of the draftsman.

Courts of Equity do not assume jurisdiction to reform deeds, unless the transaction be based on a valuable or a meritorious consideration.

William Hunt did not stand in a relation to the wife and children of his brother which imposed on him either a natural or a moral obligation to make provision for them; consequently the suggestion of a meritorious consideration is out of the question, and the case depends on the allegation of a valuable consideration.

We are satisfied from the pleadings and proofs, in connection with the deeds exhibited, that the transaction was of this nature: William Hunt, a man of good estate, and without family, had been induced to advance in aid of James Hunt, who was his brother, had a large family, and had become embarrassed and much reduced in his estate, the sum of one thousand dollars, and as a security therefor had (94) taken from him a conveyance of the land on which he lived, and the negro woman and her two children, who assisted his wife in domestic matters. Whereupon, it was concluded between them that William, instead of holding the title as a security for his money, should convey it to their friend Moore, who was to hold it as a security for the debt, and at the same time manage it in such a way as to furnish the wife and children of James a home and the means of subsistence. The liberality of William did not extend so far as to make *a gift* of the land and negroes to the wife and children of his brother, but only to postpone the collection of the money due to him, in order to let the wife and children have a comfortable support out of the profits of the property, retaining, however, his lien on the property as security for the payment of the amount of his debt, together with the interest thereon.

Viewed in this light, the wife and children of James are not simply volunteers, nor is the transaction one of mere bounty on the part of William Hunt, but the securing of his debt of one thousand dollars with interest, formed a valuable consideration, and the unusual circumstance that the trustee was required to execute a penal bond, binding himself and his heirs to perform the trust, and hold the property as a security for the debt and interest, shows, beyond question, that the parties did not treat the conveyance as voluntary, and without consideration.

It follows that the plaintiffs are entitled, in equity, to have the deed reformed so as to vest the legal estate in the heirs of the trustee, but in urging their right to be relieved from the effects of a mistake, they are met by another maxim of equity, "he who asks equity must do equity," and inasmuch as William Hunt, for the purpose of saving a part of the property, was compelled to make a further advance of the sum of $356.45, it is right that this latter sum should be added to the original sum of $1,000, and that the property should be held as a security for the whole sum, with the interest thereon.

This meets the equity of the case, for the additional outlay (95) is embraced by the spirit of the agreement, and had a necessity for it been foreseen the deed would, assuredly, have made provision for it.

The time at which the money and interest is to be paid, is not expressly fixed, either by the deed or the bond; it was evidently not the intention to require payment so long as the proceeds of the property should be needed for the comfortable support of Mrs. Hunt, and, we think, according to its proper construction, the deed gives to her the proceeds of the property during her life, and at her death, the money charged thereon, together with interest, is to be raised out of the property, and the residue is then to be conveyed to her children.

PER CURIAM. Decree accordingly.

Cited: Day v. Day, 84 N. C., 410; *Powell v. Morrisey,* 98 N. C., 429; *Pickett v. Garrard,* 131 N. C., 197.

SAMUEL S. BIDDLE v. WILLIAM W. CARRAWAY and others.

1. Where a testator directed a pecuniary legacy of $1,500 to be paid to his wife by his executors "out of my estate," for a certain purpose, and by a codicil reduced the amount to $750, "to be paid by my executors," it was *Held*, that the terms of the codicil did not annul the force of the words "out of my estate," contained in the will.
2. Where a testator, after bequeathing certain property for the payment of his debts, gave the residue of his property in specific devises and bequests, and then bequeathed general pecuniary legacies with the direction "to be paid by my executors out of my estate," and the fund provided for the payment of debts, proved insufficient for the purpose, it was *Held* (PEARSON, C. J., dissentiente), that the pecuniary legacies were a charge upon the specific ones, and that the latter must be exhausted before the former could be touched. But whether they were a charge on the land specifically devised—*Quere?*
3. Personal property, which a testator has given away in his lifetime, and which does not need the aid of his will to pass tthe title to it, does not abate for the payment of debts, where there is a deficiency of assets, although the testator confirms the gift in his will.

(96) CAUSE removed from the Court of Equity of LENOIR.

Snoad B. Carraway died in the county of Lenoir about the year 1858, leaving a last will and testament, in which he appointed the plaintiff and the defendant William W. Carraway, executors, and this bill is filed against defendant Carraway and the legatees and devisees, and prays, among other things, for a construction of the executor's will.

The parts of such will as are necessary to a correct apprehension of the matters in controversy, are as follows:

"First. I wish my just debts to be paid out of the sales of my perish-

able property, not hereafter given away; should my perishable property be insufficient to pay my debts, I wish the following negroes to be sold on a credit of one year, with interest from the sale, Rosetta, Jordan, Joshua, Noah, John, Wesley, and also the children the said Rosetta may hereafter have; should the said negroes not be necessary for the payment of my debts, in that case I give and bequeath them to my son, W. W. Carraway, and Mary J. Nicholson, to be equally divided between them."

Second. This clause, after devising and bequeathing to Sarah F. Carraway, wife of the testator, a tract of land with the improvements, also slaves, stock, farming utensils, furniture, etc., proceeds as follows: "I hereby direct my executor to pay to my wife, Sarah F. Carraway, one thousand five hundred dollars out of my estate, to repair and furnish the house at Brandon, in Wake County, also an ample sufficiency of every necessary for the support of herself and family one year.

"Seventh. I give and bequeath unto Cousin Louisa Carraway, five hundred dollars, to be paid by my executors out of my estate."

The testator, in the other clauses of his will, devises and bequeaths, specifically, to his children and to his sisters, a large real and personal estate.

To this will, there was a codicil in these words: "Whereas, I, Snoad B. Carraway, of the county of Lenoir, and State of North Carolina, have made my last will and testament, in writing, bearing date January the twenty-eighth, one thousand eight hundred and (97) fifty-six, in and by which I have directed my executors to pay to my wife, Sarah, fifteen hundred dollars, for the purpose of repairing and furnishing the house at Brandon, Wake County. Now, therefore, I do by this, my writing, which I do hereby declare to be a codicil to my last said will and testament, and to be taken as a part thereof, order and declare that my will is, that the sum of seven hundred and fifty dollars shall be paid by my executor to my wife, Sarah, to finish the improvements and furnish the house at Brandon, Wake County, the chief part having already been done."

The pleadings disclose the fact that after exhausting the proceeds of the sale of the perishable property, and of the sales of negroes, provided by the testator as a fund for the payment of debts, there remained due from the estate debts to the amount of $5,400. The principal question raised by the pleadings is, whether the general pecuniary legacies to Mrs. Carraway, and the pecuniary legacy to Louisa Carraway, are charges upon the specific legacies, or whether they fail through a deficiency of assets.

The cause being set down for hearing upon bill, answers and exhibits, was transferred to this Court by consent.

J. W. Bryan, for the plaintiff.
Strong and *Fowle,* for the defendants.

BATTLE, J. The bill was filed for the purpose of obtaining a construction of the will of Snoad B. Carraway, deceased, and the main questions raised by the pleadings are, whether the legacies given by the testator to his wife to repair and furnish "the house at Brandon, in Wake County," and for one year's support of her herself and her family, and the legacy of $500 given to the testator's cousin, Louisa Carraway, are bequeathed in such terms as to make them a charge upon the specific legacies; or, are they to be regarded as mere pecuniary legacies, not so charged, and, therefore, first liable for the payments of debts, (98) upon a deficiency of the assets appropriated for that purpose?

The language of the bequest to the wife is as follows: "I hereby direct my executors to pay to my wife, Sarah F. Carraway, one thousand five hundred dollars, out of my estate, to repair and furnish the house at Brandon, in Wake County. Also, an ample sufficiency of every necessary for the support of herself and family for one year." The bequest to Louisa Carraway is of "five hundred dollars, to be paid by my executor out of my estate." By a codicil, the testator declared his will to be "that the sum of seven hundred and fifty dollars shall be paid by my executor to my wife, Sarah, to finish the improvements and furnish the house at Brandon, Wake County, the chief part having already been done." A question has been made upon the terms of the codicil, whether they revoke and annul the force of the expression contained in the will, that the legacy is to be paid by the executor out of the testator's estate. We think clearly that they do not; because it is manifest that the testator's only intention was to lessen the amount of the legacy, the object of the bequest having been already partly accomplished. In the late case of *Dalton v. Houston,* 58 N. C., 401, the following passage from 1 Jarman on Wills, 160, in regard to the effect of a codicil upon a will, is quoted with approbation, and we think it governs the present case: "In dealing with such cases (says Mr. Jarman), it is an established rule *not to disturb the dispositions of the will,* further than is *absolutely necessary* for the purpose of giving effect to the codicil."

Another question has also been made, whether the bequest for the widow's year's support is expressed in the terms "to be paid by the executor out of the estate," and we think it is, by force of the word "also" coming immediately after the legacy given for the repair and furnishing of the house at Brandon.

These questions are preliminary to the main one, which we will now proceed to consider. In discussing this question, we will first remark, that if the testator had simply directed the legacies to be paid out

of his estate, without saying by his executor, we should not hesi- (99)
tate to hold that they were a charge upon the land as well as upon the personal property; the former, however, being only an auxiliary fund to be brought in after the latter, as the primary funds had been exhausted. In support of this proposition, we should rely upon *Bray v. Lamb,* 17 N. C., 372, as one directly in point. The expression there was, "I give and bequeath unto Nancy Guilford Bray, five hundred dollars, to be raised and paid out of my estate." The Court held the legacy to be well charged upon the land. In delivering the opinion, we do not discover that RUFFIN, Chief Justice, laid any particular stress upon the word "raised," and we are unable to perceive any difference in the meaning of the terms "raised out of my estate," and "paid out of my estate." We do discover, though, that he emphasizes the word *"estate,"* to show that the realty as well as the personalty was included in its signification. We do not overlook the fact that his Honor uses the word "raised," and it was natural that he should do so, because that word was used in the will, but we can not perceive that he assigns to it a meaning stronger than would have been conveyed by the word "paid," to which it is conjoined. But it is unnecessary to pursue the enquiry, as it is contended in the present case that, as the legacies are to be paid out of the estate *by the executor,* the land can not have been meant, because the executor has no control given him by the will over the land, and, therefore, the term "estate" must be restricted to the personal estate. Supposing that to be so, still the expression may furnish an argument that if the testator *intended* to charge the legacies upon the real as well as the personal estate, and failed to do so as to the land, because he directed them to be paid by his executor, it shows conclusively that he intended them to be paid out of the primary fund, to wit, the whole personal estate. Waiving, however, this argument, we are inclined to the opinion that when a testator directs a pecuniary legacy to be paid by his executor out of his estate, he thereby, either expressly or by the necessary construction of his language, gives it a preference over his specific legacies, or, in other words, he means that it shall be (100)
paid anyhow, or in any event, provided all the personal assets are not exhausted in the payment of debts. But, if we are mistaken in this as a general proposition, we are satisfied that the testator so intended in the present case, and that such intention is so clearly manifested in the will itself, that we are bound to give effect to it.

The general proposition is, we think, supported by principle, as well as by the authority of the leading case, *Sayer v. Sayer,* Prec. Chan., 392. The general rule undoubtedly is, that specific legacies do not abate in favor of pecuniary legacies. This is founded on the presumed intention of the testator that they shall not so abate; but it is clear that the

testator may declare a different intention, and may, if he think proper, by express words, or by a necessary implicaion, put general or pecuniary legacies upon the same footing in this respect with specific legacies, or may impose them as a charge upon such legacies, so that upon a deficiency of assets for the payment of debts, the specific legacies shall be first exhausted before the general or pecuniary legacies can be taken. There are two classes of cases where such will be the result: first, where a testator gives specific and pecuniary legacies, and afterwards says that such pecuniary legacies shall come out of all his personal estate, or words tantamount. Secondly, where there is no other personal estate than the specific legacies; for, in that case, they must be intended to be subject to the pecuniary legacies, otherwise those legacies would be mocked; see *White v. Beaty,* 16 N. C., 87 and 320. In *Sayer v. Sayer,* the specific legacy was not subjected to the payment of the general legacy on account of the special words of the will, but the general principles with regard to the two classes of cases above specified were clearly recognized and laid down by the Lord Chancellor. In the will now before us, the testator, in plain terms, directs the general or pecuniary legacies in question to be paid by his executor "out of his es-
(101) tate," which, as there is no exception, must mean out of his whole estate.

But if the proposition that a general or pecuniary legacy is charged upon a specific one (when there is a deficiency of assets to pay both), by the express direction to the executor to pay it out of the testator's estate, is denied or doubted, we then say, with great confidence, that the testator, in the present will, has given a preference of the pecuniary legacies over the specific ones. The testator has, as we think is apparent from the will itself, given away all his estate, both real and personal, specifically, except the fund which he directs to be first applied in the payment of his debts. Of the sufficiency of that fund for the purpose intended, he expresses a doubt by saying, "Should my perishable property be insufficient to pay my debts, I wish the following negroes to be sold," etc. He then specifies six negroes whom he wishes to be sold for the payment of the residue of his debts, giving them, if not wanted, or so many of them as might not be wanted for that purpose, to certain specified legatees. The testator then, having given away specifically all his personal estate, except the perishable property which he devoted to the payment of his debts, and which he manifestly supposed might not be sufficient for the purpose, and which the answers admit was not sufficient for the purpose, out of what fund could he have intended his general legacies to be paid when he directed them to be paid out of his estate? The reply is obvious that he intended that they should be paid out of the personalty which he had given away in specific legacies, if it

should become necessary to do so. In this view of the case, we think that we are fully sustained by the decision of this Court in *White v. Green,* 36 N. C., 45. There the general legacy was given in terms not so strong in favor of a preference over specific legacies as the present. The words were, "I give and bequeath to my wife's son, William Watson, the sum of five hundred dollars, to be paid to him by my executor out of such moneys as he may think best." The case came on to be heard upon an appeal from a decree made in the Court below, and RUFFIN, C. J., in delivering the opinion of this Court said: "His (102) Honor held that the legacies to the nieces were not at all liable, because they were specific, and do not abate with or contribute to general legacies. That, we know, is the general rule, but there is an exception to it, within which, we think, this case falls. If a general legacy be expressly charged upon a specific legacy, then, of course, it is payable thereout. So, if a pecuniary legacy be given, or there be no fund to pay it, or rather, if there never was any fund to pay it, except the specific legacies, owing to the fact that everything is given away specifically, the necessary construction is that the general legacy is to be raised out of the personal estate, although specifically bequeathed. For it is not to be supposed that the testator meant to mock the legatee; *Sayer v. Sayer,* Pre. Ch., 393; Rop. on Legacies, 255 (3 Ed.); *White v. Beattie,* 16 N. C., 87 and 320. This will descend so minutely into the enumeration of articles, that it is merely to be inferred from the will itself that it disposes of, or professes to dispose of, all the property the testator had. But the answers, which are to be taken to be true, remove all doubt. They state that the testator left nothing, and had nothing at the making of the will, applicable to the payment of this legacy, but such as he has given specifically. He left cash and debts due to him to the amount of about $100; but he owed a larger sum. This we think a sufficient ground of itself for holding the specific legacies liable, without recurring to the direction to the executors to pay the pecuniary legacy 'out of such moneys as he may think fit.' Those words, however, strengthen the inference of the charge; because 'moneys' could not mean cash in hand (of which there was only about $20), but meant cash to be raised by the sale or hiring of *property.*"

These remarks are, in our opinion, almost, if not quite, as applicable to the facts of the case now before us, as they were to that in which they were made, and lead irresistably to the conclusion that the testator, in the present case, intended to charge, and has effectually charged, the general legacies in question upon all the specific legacies, so that all the latter are to be taken for the payment of the testa- (103) tor's debts before the former can be touched. The specific legacies to the widow herself will be taken, or, if all are not wanted, will abate *pro rata* with the others.

We have examined *Everett v. Lane,* 37 N. C., 548, and *Shaw v. McBride,* 56 N. C., 173, to which our attention has been called by the counsel for the defendants, and do not find anything in them inconsistent with the principles which we think lead to the conclusion at which we have arrived.

The personal property which the testator had given away in his lifetime, and which did not need the aid of his will to pass the title to it, can not be taken, because such gifts are not legacies of any kind.

The questions on which we have declared our opinion are the only ones which have been argued before us, and we presume the parties may now frame a decree which will put an end to their litigation.

MANLY, J., concurred in the above opinion.

PEARSON, J., *dissentiente.* The large fund not specifically bequeathed, consisting of perishable property, crops, etc., debts due testator and certain slaves, turns out not to be sufficient to pay the debts and general pecuniary legacies.

The question is, what is to be done in this unexpected state of things?

It is clear the specific legacies must abate in order to pay the debts; but must a further abatement be made to pay the general pecuniary legacies in full? or to contribute *pro rata,* so as to divide the loss? Or are the pecuniary legacies to fail because of this want of funds?

The general rule is admitted to be that specific legacies do not abate in favor of general pecuniary legacies, unless there is something in the will to show an intention on the part of the testator to give a preference to the latter. The rule is founded on this reason: A specific legacy is a perfected gift, made by the testator himself, who points out the
(104) identical subject of the gift, whereas, a general pecuniary legacy is only a direction to the executor to pay a certain amount provided he has funds in his hands.

I do not find any ground in this case for making an exception to the general rule. 1. It is a correct principle, that if one makes specific bequests of *all of his estate,* and also makes a general pecuniary legacy, it will be implied that it was his intention to subject the specific legacies to the payment of the pecuniary legacy, "for otherwise he would mock the legatee"; *Sayer v. Sayer,* Pre. Chan., 393. "Suppose one possessing a personal estate at B and C only, bequeath it specifically to D and E, and then gives a legacy to F generally, the personal estate at B and C will be liable to the payment of this legacy, *as there never was any other fund out of which the legacy to F could have been satisfied";* 1 Roper, 418; Toller on Executors, 226.

The difficulty seems to be in making the application of the principle, which no doubt arises from the fact that it always appears to be a

"hard case" that a legatee should lose the bounty which he expected, and which was intended for him. There is no doubt that every testator intends and expects that all the legatees will get what he gives them, and when an unexpected state of things arises, so that some must be disappointed, it is considered hard that one to whom a small *money* legacy is given, say $500, should lose it all, and one to whom a specific legacy of the value of many thousands is given, should get all of it, which is ordinarily the case. But reverse the position, shall one to whom a small specific legacy is given, say a watch or riding-horse, be obliged to give it up for the benefit of one to whom a legacy of $10,000 is given, and then the supposed hardship is put on the other side. This is the mode to test the principle and avoid the danger of a misapplication.

No one can read *White v. Beattie,* as at first decided, 16 N. C., 87, without being satisfied that the Court was led into a misapplication of the principle because of the supposed hardship. Indeed, when the case was again brought before the Court eighteen months afterwards, 16 N. C., 320, the former decree is reversed, and Judge (105) HENDERSON, after showing that the principle only applies where the testator gives away *the whole of his estate in specific legacies,* and then gives a pecuniary legacy, and that it does not apply when there is *any portion* of the estate not given away in specific legacies, although such portion may be lost or wasted by the executor, or consumed *in the payment of debts,* concludes by saying the case of *Sayer v. Sayer* does not support the former decision. "The truth is, when the case was before us heretofore, the facts were strangely misconceived."

In *White v. Green,* 36 N. C., 45, the same principle came up for application; the principle is correctly defined; *Sayer v. Sayer* and *White v. Beattie* are cited, and the Court say: "It is nearly to be inferred from the will itself, that it disposes, or professes to dispose of, all the property the testator had; but the answers remove all doubt; they state that the testator left nothing, and had nothing applicable to the payment of this legacy, but such as he had given specifically." Whether that is not another instance where the Court, after correctly stating the principle, depart from it in making the application, by introducing the words *"left nothing, and had nothing applicable to the payment of this legacy,"* may be questioned; for, taking the principle as defined in that case, and in *White v. Beattie* and *Sayer v. Sayer,* it is obviously necessray, in order to make it applicable, that the testator should give away the whole of his estate in specific legacies, for otherwise the natural inference is, that he was mistaken as to the amount of his debts, which is by no means an unusual thing, and there is no necessity for presuming that he intended to charge the specific legacies

with the payment of the pecuniary legacies, in order to avoid the inference "that he intended to mock the legatee." So, in my opinion, the principle does not apply to our case.

2. The words, "to be paid by my executors out of my estate," added to the legacy of $500, can not, in my opinion, be allowed the effect of making this case an exception, because they are not sufficiently
(106) expressive of an intention to charge the legacy of $500 on the specific legacies. Instead of giving to them the effect of making a charge, I think they are rather to be treated as expletive, or words of surplusage. A testator gives his negro man "Jacob to A, to be delivered to him by my executor"; these words are expletive, and amount to no more than would be implied; and he gives $500 to B, "to be paid by my executor out of my estate"; these words are expletive, for, as a matter of course, if paid at all, it will be paid out of the estate. Should it, contrary to all expectation, turn out that the balance of the estate is all exhausted in the payment of debts, so as only to leave "Jacob" on hand, it seems to me a strange result that the negro given to A must be sold in order to pay B the $500! At the most, it would seem that B could only expect A to divide the loss with him, and yet, if the words amount to a charge, B must be paid the whole $500, although A will thereby get nothing at all. To justify such a result, surely the intention to create a charge ought to be clearly expressed.

Bray v. Lamb, 17 N. C., 372, is relied on to support the position that these words create a charge. The words there were: "I give Nancy Bray five hundred dollars, to be *raised* and paid out of my estate." The case was attended with some peculiar circumstances, which are referred to in support of the conclusion, but the main stress was put upon the word *"raised"* out of my estate, which word was supposed to be peculiarly appropriate to create a charge; and it is remarkable that the words "to be paid" out of my estate are treated as amounting to nothing, and are not alluded to in the opinion; so, that which the builders then rejected as useless, is now to be made the cornerstone!

In the earlier cases cited by Powell on Devises, when land was not liable for the payment of simple contract creditors, the Courts seized on almost any words to create a charge in favor of such creditors. "I direct my debts to be paid" out of my estate; or, "I wish all of my just debts to be paid," were held sufficient to create a charge on land in
(107) favor of creditors; but since the law has been changed, such words are treated as mere surplusage, and no meaning is attached to them, and, as far as my researches have gone, such an effect never was given to words of this kind in order to create a charge in favor of general pecuniary legatees, at the expense of specific legatees, and in our case, in respect to the other pecuniary legacies to the widow, as she

is a specific legatee of a large amount of property, she, as such, will be obliged to contribute to pay her own pecuniary legacies! Can it be supposed in the absence of plain words that such was the intention of the testator?

PER CURIAM. Decree according to the opinion of the Court.

Cited: Lassiter v. Wood, 63 N. C., 364; *Devereux v. Devereux,* 78 N. C., 389, 490; *Worth v. Worth,* 95 N. C., 242; *Heath v. McLauchlin,* 115 N. C., 402.

Dist.: Mitchener v. Atkinson, 62 N. C., 27; *Hines v. Hines,* 95 N. C., 484.

THOMAS HADLEY v. WILLIE D. ROUNTREE.

Where dealings between a father-in-law and his son-in-law, wherein the latter had been the other's agent, were closed in a hurried manner, and a note given by the father-in-law at the importunate solicitation of the son-in-law, on calculations made by him, under a promise that the whole settlement should be open to subsequent examination, and the answer to specific allegations of errors was unfair and evasive, it was *Held,* that an injunction to restrain a judgment at law on such note should be continued to the hearing, and that the judgment should stand as security for whatever might be ascertained to be due.

APPEAL from an interlocutory order of the Court of Equity of WILSON.

The plaintiff, Hadley, and the defendant, Rountree, entered into a written agreement 16 December, 1856, wherein it was stipulated that the said Hadley was to put the said Rountree into possession of his mills and farm on the 1st of the next ensuing January, which the latter was to hold until 1 January, 1859; that Hadley was to pay for all hires of hands, buildings and purchases for the use of the (108) premises; that Rountree was to give his personal attention to the business, and was to receive, at the end of each year, one thousand dollars as his wages, and that any advances of money which he might make were to be deducted out of the proceeds of the farm, mills, etc., and the business to be closed at the end of each year by note. At the close of 1857, Rountree presented his account, and Hadley gave him a note for $14,815.91, on which suit was brought at law and a judgment recovered. The bill is brought to enjoin the collection of this judgment, and to have an account taken between the parties, alleging fraud and imposition in the conduct of the defendant in obtaining the note from him, and many false charges and suppressions of credits in the account on which the note was founded. The plaintiff alleges that he is an old man, and that his business had become much confused, and having much

confidence in the defendant, who is his son-in-law, he was induced, for the purpose of relieving himself, to enter into the contract above stated. He says towards the close of the year 1857, the defendant became urgent for him, plaintiff, to settle with him and give him a note for the amount due; that to get rid of these importunities, and relying on the word of the defendant, who promised that the whole account should be re-examined by some competent person, and any errors that might appear should be corrected, he was induced to sign the note aforesaid; that all the calculations were made by the defendant, and that the plaintiff did not at all canvass them, nor any of the items of the account; that all the vouchers, receipts, etc., on which this account was alleged to be based, were retained by the defendant, and that he had refused to surrender them to the plaintiff. Among other specifications of the falseness of this account, it is alleged that the defendant had failed to give him credit for seven bales of cotton, of the crop of 1856, which were on hand when the defendant took charge of the business, and that no notice is taken of this cotton in any part of the account.

To the allegation as to the cotton, the defendant answers as
(109) follows: "This defendant has no recollection of the seven bales of cotton having been committed to his hands, and does not believe it to be true; but of this the defendant is certain, if it ever came to his hands, the complainant received the proceeds. There would appear no item of it in the account of 1857, since the transactions, under the contract, for each year were to be kept distinct."

To the charge that the defendant had withheld the vouchers, the defendant answers and admits that he kept them, but says, "Of this the plaintiff cannot complain, since they are of no service to him whatever—consisting of receipts for money paid to third persons, sheriff's receipts for money paid on executions against him, etc., etc. There is no evidence of debt whatever held by this defendant against the complainant among these vouchers, and they are, and always have been, open to the inspection of the complainant."

The conflict between the last recited passage of the answer and several items of charge in the account filed by the defendant as an exhibit, is pointed out in the opinion of the Court.

On the coming in of the answer, the Court below ordered the injunction, which had been issued in the case, to be dissolved, and the plaintiff appealed to this Court.

A. M. Lewis, for the plaintiff.
Dortch and *Strong*, for the defendant.

PEARSON, C. J. By force of the agreement executed 16 December, 1856, the defendant was bound, at the close of the year 1857, to render an account.

From the answer and the account filed as an exhibit, we are satisfied that, so far from rendering a full and fair account, as he was bound to do, the defendant induced the plaintiff to execute the note mentioned in the pleadings upon the footing of calculations by himself, upon loose statements and detached papers, without time for examination; so that, in fact, there was no account rendered, and nothing done by the parties, considering the relation in which they stood, (110) which can be allowed the effect of a settlement.

The answer is unfair and evasive in many respects; for instance, to the charge that when the defendant took possession of the farm and mills there were on hand, among other things, seven bales of cotton, which the defendant had failed to account for; the response is: "This defendant has no recollection of the seven bales of cotton having come into his hands, and does not believe it to be true; but of this the defendant is certain, if it (the seven bales of cotton) ever came to his hands, the complainant received the proceeds. There would appear no item of it in the account of 1857, since the transactions, under the contract, for each year were to be kept distinct."

The first attempt is made to evade this charge by treating the seven bales of cotton as of no more importance than a stack of fodder, about which the defendant could not be expected to have any distinct recollection! The second is by a suggestion that the seven bales of cotton, being of the crop of 1856, did not form an item in the account of 1857, as the transactions of each year, by the contract, were to be kept distinct. If this cotton did not make an item in the account for the year 1857, it certainly would not in the account for the year 1858! But supposing this cotton to have been on hand on 1 January, 1857, and in regard to a fact of that importance, an agent, who is bound to render an account, is not at liberty to leave the matter in doubt, then it did properly form an item of account for the first year, as much as the lumber and other articles on hand when the defendant took charge of the business, and the loose and general statements of the answer in regard to it shows the sort of "settlement" made on 1 January, 1858, when the plaintiff was induced to execute his note.

Again, the bill charges that the defendant kept possession of all the vouchers, receipts, etc., on the footing of which the calculations were made and the note executed. The answer admits this, and by way of explanation says: "The plaintiff can not complain, since (111) they are of no service to him whatever—consisting of receipts for money paid to third persons, sheriff's receipts for money paid on executions against him, etc., etc. There is *no evidence of debt whatever held by the defendant against the complainant among the said vouchers,*" and yet, in the account filed with the answer as an exhibit, is this item:

"Note due 1 January, 1857, with interest to 1 January, 1858, $1,718.33," which is thus charged to the plaintiff, but is held by the defendant. Again: although the note is executed 1 *January,* 1858, as for a balance, $14,815.91, then due, in the account, set out for the purpose of showing that balance, there are several charges in *January and February,* 1858, *e. g.,* cash paid Moses Rountree 19 *January,* 1858, $958.14; cash paid Rountree & Co., 4 February, 1858, $370.21.

It is unnecessary to make further specifications. "The judgment at law ought only to be allowed to stand as a security for whatever may be found to be due to the defendant upon taking an account between the parties, on the footing of the principal and agent"; *Franklin v. Ridenhour,* 58 N. C., 422.

There is error in the decretal order dissolving the injunction. It ought to be continued to the hearing.

PER CURIAM. Decretal order reversed.

Cited: Levin v. Gladstein, 142 N. C., 490.

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(112)

WILLIAM C. EBORN, Adm'r., v. JOSEPH WALDO, and another.

1. There is no ground for going into a court of equity to recover back damages, assessed at law, in behalf of a defendant to an action of replevin, upon the ground that the plaintiff has the title, and has brought another action of replevin, but can not recover back those damages in that or any other action at law.
2. Except to stay waste or prevent some irreparable injury, the writ of injunction is only issued as ancillary to some primary equity, which the bill seeks to enforce.

CAUSE removed from the Court of Equity of MARTIN.

The plaintiff in this suit is the administrator of one Abner Williams, and the bill alleges that the intestate, Williams, being much impaired in mind by an immoderate use of spirits, was induced by the defendant, Waldo, to make him a power of attorney to sell a negro slave, named Jack, belonging to said Williams, and afterwards, a few days before the death of Williams, the defendant, Waldo, sold the negro to one Morrisett, the other defendant in this suit. The plaintiff, Eborn, as the administrator of Williams, brought an action of replevin against Waldo and Morrisett, to recover back the slave, and under that writ the slave was put into his hands by the sheriff. The plaintiff was nonsuited in that action of replevin, upon a technical point, and a jury being empaneled, assessed defendants' damages, for the detention of the slave during the action, at $316, and execution issued for the amount. It is stated in the bill that Waldo is totally insolvent.

The plaintiff brought another action of replevin for the slave against the same parties, which was pending at the filing of this bill.

The prayer of the bill is that the plaintiff be allowed to pay the money into court and await the decision of the action at law, now pending, and for an injunction to restrain the collection of the execution during that time.

Upon defendant's filing his answer, the injunction was ordered to be continued to the hearing, and the cause being set for hearing upon bill and answer, was transferred to this Court by consent.

Donnell, Winston, Jr., and *Warren,* for the plaintiff.
Rodman, for the defendants.

MANLY, J. If we suppose in the second action of replevin, (113) which the bill alleges is now pending, the plaintiff established his right to the slave in question, and, by consequence, established the position, that the results of the first action were not in accordance with the rights of the parties, still the bill is without equity.

The court of equity does not interfere to prevent the enforcing of a recovery at law for errors of both law and fact, much less will it interfere to prevent the operation of what may be regarded as a hard feature in the law. The assessment of damages, after the nonsuit, on the trial of the first action of replevin, was in strict accordance with the course of the Court, under the law regulating that action. No error is even alleged, and the probability that a second action may result differently is not ground for arresting the execution of the first.

It is not an anomaly without parallel that property upon one trial is established to be in a party, and upon a second, found to be in the other. Such inconsistency results from the infirmity of human tribunals, and is, for the most part, caused by the blunder or laches of the losing party on the trial of the first. A court of equity is surely not expected to protect parties from the consequences of their blunders and negligences at law.

There were open to the plaintiff, in this case, three modes of redress: an action of trover, of detinue, and of replevin. He chose the latter, which is subject to the incident, that if he lose the suit by verdict or *nonsuit,* where he is put into possession of the property under the writ, damages shall be assessed against him for the detention. The recovery complained of, therefore, arose from his preference of a form of action, and failure in it from any cause. Whosoever adopts it, is supposed to foresee its perils, and, relying upon the impregnable nature and easy proof of his title, to be willing to encounter the hazards. It may be remarked, in this connection, that our opinion, as to the want of equity in the bill, is not at all dependent upon the enquiry, whether the damages

recovered in the first action may or may not be recovered back
(114) in the second, should the plaintiff succeed. For, if it be conceded that they may be, there is no allegation of the insolvency of Morrisett, whereby the judgment at law would be of no avail.

This brings us to another ground of objection to the bill, viz., that no relief is sought by it which can constitute a *corpus* for the Court's jurisdiction.

It is hardly necessary for us to refer to the many cases in which we have found it necessary to declare, recently, that a bill for an injunction, merely, without asking other relief, can not be maintained, except in cases of waste and irreparable injury. In all other cases, injunction is ancillary *process,* and is only proper where it is in aid of a primary equity, set forth in the bill. No such equity is disclosed.

It is not a bill to have judgments at law set off, the one against the other; for there is no prayer to that effect, and no allegation of defendant's insolvency, which is the basis of equity jurisdiction in such cases. *Iredell v. Langston,* 16 N. C., 392. Its object seems to be to obtain a reversal by the Court of Equity of the judgment in the first action of replevin, upon the ground that there is no relief, at law, through the subsequent action or otherwise. But this is clearly inadmissible. A court of equity never allows an appeal to it for a new trial of a case, which depends upon legal defenses, and which has been tried at law. *Pearce v. Nailing,* 16 N. C., 289.

PER CURIAM. Bill dismissed.

Cited: Martin v. Cook, post, 200.

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(115)

JONATHAN HAVENS v. JAMES E. HOYT and others.

Where it appeared that a contract made with a corporation to do certain work, was fulfilled to the satisfaction of the board of directors managing the concerns of the corporation, and that such work was done on favorable terms, and was beneficial to the company, it was *Held,* that a court of equity would not, on the allegation of one of the corporators that there was a secret agreement between one of the directors and the contractor to divide the profits, enjoin the payment of the stipulated compensation.

APPEAL from an interlocutory order of the Court of Equity of BEAUFORT.

The bill is filed by the plaintiff, as a stockholder in the "Washington Gas-Light Company," in behalf of himself and the other corporators of the said company, against the defendants, as president and directors of the said company, and against James E. Hoyt, individually. The

bill alleges that the directors appointed James E. Hoyt, one of their number, to make a contract in behalf of the company with some competent and responsible person, for the erection of the necessary gas works, and laying the necessary pipes, in order to effectuate the purpose of the company, and that the said Hoyt did make a contract for the constructing of the said gas works and appurtenances, with one Samuel Merrill; and that he was, at the time, secretly, a partner with the said Merrill, and was to have two-thirds of the profits arising from the fulfillment of the undertaking, and that he fraudulently, and by combination with Merrill, and for their mutual gain and profit, put the amount of compensation at a higher sum than the work was worth; and at a higher price than the said Merrill had previously offered to do it at; that the work was nearly finished, and that the directors were about to pay to Merrill and his secret partner, Hoyt, the last payment due for the construction of the said works; that the portion of the said Hoyt's profits is $800, and thirteen shares of the capital stock of the company.

The prayer is, that the Court will declare the share of the said profits coming to Hoyt, to belong to the company, and direct an injunction to the president, secretary, treasurer and directors of the (116) said company, forbidding them from paying over the said sum of $800, and from giving certificates for the said thirteen shares of stock to the said James E. Hoyt, and for general relief.

The answers of both Hoyt and the directors say that Merrill was the lowest bidder; that his bid was $1,000 less than the only other bid made for the work, and that this bid was made to the directors themselves, and not to James E. Hoyt, as their agent, and by them, as a board, accepted; and that all that Hoyt had to do with it, except as a director, was to have the contract with Merrill formally executed according to the terms offered and accepted. They both say that the terms were reasonable; and that the work has been done satisfactorily, and the company express their willingness to pay the compensation agreed upon, whenever released from the injunction.

Hoyt, in his answer, says that he recommended Merrill to the board, and informed them that, as he was without means, he expected to assist him in the execution of the contract, both as to advancing the money necessary to buy materials, and in procuring him security to perform his part of the obligation; that these assurances were made as inducements for the company to employ Merrill; and he believed that it was understood by the company that he would participate in Merrill's contract; that he did enter into an agreement with the said Merrill to furnish all the money necessary, and to carry on the work, to go on to the cities where gas works were in the most successful operation, and obtain information as to the best and most economical manner of con-

structing and using them; that he not only, according to this contract, advanced the money necessary to begin the undertaking, but he went to the Northern and other cities, and examined diligently into the several modes of erecting and working gas works, and obtained an amount of information which enabled Merrill to do the work cheaper and better than it otherwise could have been done; and, besides this, he gave constant attention to the work as it was going on, and he says his part of the profits (two-thirds) was by no means unreasonable. The
(117) company, however, say they were not aware that Hoyt was to be a partner with Merrill; but they say the work was well, judiciously and cheaply done.

On the coming in of the answers, on motion, the injunction was ordered to be dissolved, and the plaintiff appealed.

Donnell, Fowle & Warren, for the plaintiff.
Rodman, McRae & Carter, for the defendants.

MANLY, J. Our reflections upon the questions presented by the pleadings in this case have conducted us to the conclusion that the injunction was properly dissolved in the Court below.

This conclusion has been induced, chiefly, by the purport of the answer from the president and directors of the company. This body express their entire satisfaction with the manner in which the work contracted for has been executed, and announce their willingness now to pay for the same according to the contract. It seems to us a single corporator of a joint stock company has not the power to repudiate a contract made by his authorized agents, the directors, in the face of such avowals. His redress, if he have any, is against the board of directors, and a writ restraining them from the fulfillment of the work assigned them ought not to be continued without an allegation, at any rate, of irreparable mischief. Should the directors participate in any fraud, or be guilty of gross negligence in office, to the prejudice of a stockholder, they might, we take it, be liable to him.

The two positions of defendant, Hoyt, that is, in the board of directors, and in copartnership with Merrill, are not consistent. The duties appertaining to them, respectively, may, and probably will, be irreconcilable. Hence, they can not be occupied covertly, without subjecting the party to suspicion, and to a rigid accountability. But upon questions arising out of that condition of things, as between the company and director, we do not propose to enter, and have referred to the
(118) matter only in order to obviate any misconstruction of our views.

The single question now before us, is, ought the injunction to be continued at the instance of a stockholder, when the answer of the

directors of the company, confirming to that extent the answer of the defendant, Hoyt, declares that the contract was an advantageous one for the company, was at the lowest price offered, and has been faithfully executed; and when the company express their wish now to make the deferred payment, if not restrained by the Court.

There is no error in the interlocutory order appealed from.

PER CURIAM. Affirmed.

JOHN R. RIGGS and others v. C. V. SWANN, Adm'r.

There is, in this State, no statute which requires that the declaration of a trust, made at the time when the legal title to land or slaves passes to one, who agrees to hold in trust, shall be in writing.

CAUSE removed from the Court of Equity of CRAVEN.

John R. Riggs, being indebted to Seth Muse in the sum of $702.50, in 1846, made a deed to the said Muse for two negro slaves, Abram and Joe, as security for that sum, and at the same time took from the latter a deed of defeasance, declaring the terms on which the said slaves were conveyed to Muse, the substance of which was, that whenever the said sum of $702.50, with interest, was paid, Muse should reconvey the said slaves to Riggs. According to the spirit and meaning of this trust, the said Riggs remained in possession of the slaves, Abram and Joe, until 1850. On 14 January of that year, in order to pay off a part of the debt then due to Muse, it was agreed between them two and one Samuel Jones, who was the brother of Riggs' wife, that Muse (119) and Riggs should both join in a conveyance of the two slaves to Jones, and that he should convey one of them, Joe, to Muse, absolutely, at the price of six hundred and fifty dollars, which was to be credited on the said debt of $702.50.

The bill alleges that a part of the above arrangement was that the said Samuel Jones was to have the use of Abram at the price of $125 a year, until his work should amount to the balance of the debt due Muse, and that he was then to convey him to the plaintiffs, the children of the said John R. Riggs; that Riggs had put other property in his hands to assist in paying off this balance, and that a part of the arrangement was, that whenever Riggs should stand particularly in need of the said slave, Jones was to let him come and assist him in his work, and it is alleged that during some part of each year, as long as Jones lived, the slave was in Riggs' possession. The bill further alleges that, by means of the hires of Abram, and the other means put into Jones' hands, he has received more than enough to satisfy the whole, principal and interest, of the debt to Muse, and still hold an overplus, to which the plaintiffs are entitled.

Samuel Jones died in 1855, and the defendant Swann administered on his estate. The prayer of the bill is for a surrender of the slave, Abram, and an account of the hires of the slave, and the other property put into the hands of defendant's intestate, Jones, on the trusts aforesaid.

The defendant answered, but did not profess to know anything of his own knowledge, but he insisted on the statute requiring contracts about slaves to be in writing, as a bar to plaintiffs' equity. There were proofs taken which sustained the plaintiffs' allegations. The cause was set down on the pleadings and proofs, and sent here by consent.

J. W. Bryan, for the plaintiffs.
Hubbard, for the defendant.

PEARSON, C. J. The bill is not filed for the purpose of obtaining specific performance of an agreement to convey the slave men-
(120) tioned in the pleadings, but for the purpose of setting up and having enforced a trust declared in favor of the plaintiffs by their father at the time the title was passed to the intestate of the defendant, Swann.

The objection that the declaration of trust was not in writing, and was, therefore, void, is not tenable. There is, in this State, no statute which requires the declaration of a trust made at the time the legal title passes to one, who agrees to hold in trust, shall be in writing. This question is settled by the case of *Shelton v. Shelton,* 58 N. C., 292, and the learning on the subject is there fully explained. In that case, the subject matter was land; in this it is a slave; but there is no distinction between land and slaves. The act of 1819, Rev. Code, ch. 50, sec. 11, puts contracts to sell land and slaves on the same footing, and has no reference to a declaration of trust, as is shown in that case. The objection based on the rules of evidence, is also there shown to have no bearing on the question. In short, that case is decisive of this; and it is unnecessary to elaborate the subject any further.

PER CURIAM. Decree for the plaintiffs.

Cited: Whitfield v. Cates, post, 139; *Ferguson v. Haas,* 64 N. C., 778; *Gorrell v. Alspaugh,* 120 N. C., 367, 373; *Hughes v. Pritchard,* 122 N. C., 61; *Owens v. Williams,* 130 N. C., 168; *Gaylord v. Gaylord,* 150 N. C., 236; *Anderson v. Harrington,* 163 N. C., 142; *Brogden v. Gibson,* 165 N. C., 25.

SAMUEL JOHNSTON v. H. C. MALCOM and wife and another.

1. A deed combining the two characters of a deed of trust to secure creditors, and a deed of settlement in trust for a wife and children, may operate and have effect in both characters, provided it has been duly proved and registered.
2. A deed of settlement, in trust for a wife and children, proved and registered three years after the date of its execution, was *Held*, to be valid as against creditors, whose debts were contracted after such registration.

CAUSE removed from the Court of Equity of CABARRUS. (121)

Samuel N. Black, on 12 December, 1849, conveyed by deed to Hugh McAulay and his heirs, two tracts of land and twelve slaves, in trust, to secure all his creditors (naming them and the amount of their debts); the deed then proceeds: "And whereas, the said S. N. Black has, unfortunately, contracted the habit of intemperance, so much so that he is frequently unqualified properly to discharge and manage his affairs, and being desirous to secure a good and respectable living for his wife and children, as he received a large share of his property by his wife, it is, therefore, understood, stipulated and agreed," etc., and then gives her the sole and separate use in all the said property not required in the payment of the trustor's debts, and then limits the remainder to his son, the defendant Calvin, and any other child he might have by their marriage, with certain contingent limitations in the case of her death and that of Calvin.

This deed was first proved before the Clerk of Cabarrus County Court on 2 January, 1850, and was shortly afterwards registered.

Afterwards, at April Term, 1853, of Cabarrus County Court, it was proved in open Court by the subscribing witness, and was ordered to be registered, and was registered on 8 June, 1853. Previous to this time all the debts owing by Samuel N. Black had been paid off. On 28 August, Black bought of the plaintiff, Samuel Johnston, a negro woman slave and two small children, at $775, and the said Samuel N. Black, his wife, the said Judith E., both signed a note for the price of the slaves, she negotiating and conducting the whole trade. Suit was afterwards brought against Black on this note, and he dying in 1853, it was continued against his executrix, the said Judith, and a verdict and judgment taken against her on the pleas then in issue. Afterwards, on a *sci. fa.* against her, to show cause why she should not pay this judgment out of the assets of Samuel N. Black's estate in her hands, she pleaded fully administered and no assets, which pleas were found in her favor. Judith Black has since married the defendant Mal- (122) com, and this bill is brought against them, and against her as executrix, and against the trustee, McAulay, and Calvin M. Black, the

only child and tenant in remainder under the said deed, seeking to set aside the deed of trust as to the settlement to the feme defendant and her son, on the ground it could not operate in the double aspect of a deed in trust for creditors and a deed of settlement for the sole and separate use of the wife and her children; and insisting, furthermore, that, not having been registered within six months after it was made, it was null and void as to creditors, according to the twenty-fourth section, thirty-seventh chapter of Revised Code. The bill also prays a discovery of assets in the hands of the said Judith, which it is alleged she fraudulently conceals, etc., and seeks to subject certain property to the payment of his debt, on the further ground that, acting under a power of attorney from her trustee, she sold property conveyed in trust, and gave the proceeds to her husband, with which he bought other property, which she now claims as trust property, but which is, in fact, the property of her late husband, Samuel N. Black. The answer of the defendants is full as to the state and condition of the property now held by the said Judith and her husband, but it is not germain to the questions treated of in this Court.

Fowle, for the plaintiff.
Boyden, for the defendants.

PEARSON, C. J. The opinion of the Court is with the defendants on both points made on the argument.

1st. The deed executed by Samuel Black to McAulay, 12 December, 1849, combines the character of two instruments—a deed of trust to secure creditors, and a deed of settlement in trust for a wife and children, and there is no reason why it may not operate and have force and effect in both characters, provided the ceremony which the law requires in respect to attestation, probate and registration is duly complied with.

An analogy may be found in the case of a will, where, most (123) usually, the same instrument contains a will of personalty, according to the common law, and a will of land, according to the statute, and no objection was ever made, although, originally, the mode of attestation was different, and the probate of one was required to be in the Courts of Law, and of the other in the ecclesiastical Courts. The probate of the instrument in one character had no effect upon its validity in the other.

In respect to the probate and registration of the instrument now under consideration, in its character of a deed of trust to secure creditors, no question is presented. This Court is of opinion that in its character of a deed of settlement in trust for a wife and children, the probate, in open Court, at April Term, 1853, and its registration on

8 June, 1853, made it valid, not only between the parties, but as against creditors whose debts were contracted afterwards, and that it was void only as against creditors whose debts were in existence, or in contemplation, at the date of such registration. This, we believe, has been the universally received construction of Rev. Statutes, ch. 37, sec. 29, and Revised Code, ch. 37, sec. 24, and we are satisfied, upon a consideration of the purposes of these enactments, that this is the proper construction. A mere voluntary deed to a stranger, without any *meritorious* consideration whatever, is allowed to have this effect.

2d. As the bill of sale for the slaves, which was executed by the plaintiff, passed the title to Black, and his estate has had the benefit of the purchase, the signature of Mrs. Black must be treated as having been done in the mere character of her husband's security, and can derive no aid from the fact that McAulay, the trustee, had given her a power of attorney to act as his agent in respect to the trust property. So, the case is that of a *feme covert* executing a bond without making it a specific charge on her separate estate, and without the concurrence of the trustee, and falls under the doctrine announced by this Court; *Knox v. Jordan,* 58 N. C., 177.

There will be a decree declaring the opinion of the Court on these points, and subject thereto the plaintiff may take an order (124) of reference for an account.

PER CURIAM. Decree accordingly.

JOSEPH WEISMAN v. PENELOPE SMITH and others.

1. Whether a court of equity would interfere to compel a specific performance of a contract between two joint owners of land that neither should sell without first giving the other the refusal of it—*Quere?*
2. A sale of a part of the interest of one, by the consent of both of two joint owners of land, as to which there was a right of pre-emption, without any provision as to its future exercise, justifies the inference that such right was intended to be abandoned.
3. On the death of one of two joint owners of land, between whom the right of pre-emption existed, it was *Held,* that such right can not be enforced specifically against his devisees.
4. Where the defendant has a distinct equity, he must set it up by a cross bill; or by an original bill; but he can not have the benefit of it by an answer.
5. After the death of one of the members of a copartnership, the statute of limitations begins to run in favor of his personal representative against a claim to have an account of profits received by him.

CAUSE removed from the Court of Equity of WAKE.

The plaintiff, Weisman, and Richard Smith, deceased, on 21 January, 1843, entered into an agreement in writing, to purchase and work, in copartnership, black lead or plumbago mines in the county of Wake. Smith, by said agreement, was to advance the requisite funds to purchase the lands containing the mineral, to an amount not exceeding $10,000, and as soon as the lands were purchased, Smith was to convey one-half thereof to Weisman in fee, and Weisman was to pay Smith $3,500 at the expiration of five years, without interest, for his moiety, for which the plaintiff pledged his interest; and should the purchase of the necessary lands exceed $10,000, the excess should be a charge upon the profits of the concern. As soon as the purchases were made, the parties (125) were to commence the business of raising, preparing for market, and sellnig the mineral, under the name and style of "Smith & Weisman," and the plaintiff was to lend his constant attention to the business personally. The covenant concludes thus: "And it is further covenanted as follows, to wit, that if either party shall, at any time, wish to withdraw from the said concern, he shall not be at liberty to sell or convey his share or moiety, or any part or portion thereof, to any other person, before he shall have given to his copartner at least twelve months' notice thereof, and to whom the refusal to purchase shall always be given within that time. And the parties do severally bind themselves, their heirs, executors, administrators or assigns, to the strict performance of this last article."

Smith, in pursuance of this contract, bought a large quantity of land, lying mostly in separate and disconnected parcels, for which he took deeds in fee simple to himself, for which he paid an excess over ten thousand dollars of about six thousand dollars, and the bill charges that he cut fire wood and received rents from the said land up to the time of his death, in 1852, and afterwards his devisees, the defendants Penelope and Mary Ann, did the same, until they sold the whole of their interest in the premises, in April, 1854. The plaintiff also charges that the said Smith obtained large quantities of the mineral, plumbago or black lead, which he sold in the Northern markets, and for which he received the money, at high prices, but did not account with the plaintiff for any part of it.

In October, 1849, Weisman, with the consent of Smith, agreed to sell to one James Hepburn, one-half of his interest in the said mines, to wit, one-fourth part thereof, at the sum of $10,000, and on receiving the sum of $3,500 in cash and $6,500 in a note payable to Weisman, and endorsed by him to Smith, he, Smith, made to Weisman and Hepburn a deed for one-half of all the several tracts of land that had been purchased by him for the purposes of mining, as stated, except two small tracts hereafter referred to, and took from them a mortgage of

their interest to secure the said sum of $6,500. This latter sum (126) Smith claimed for advancements made by him over and above the sum of $10,000, which he was bound by the contract to invest. This sum of $6,500 has since been paid by Hepburn to the assignees of Smith.

In the month of April, 1854, James Hepburn sold his interest in these mining lands to William H. Winder, of the city of Philadelphia, and subsequently, to wit, on 20 April, 1854, Mrs. Penelope Smith and Miss Mary Ann Smith, the devisees of the said Richard Smith, sold their interest, to wit, one-half of the said land, to the said William H. Winder, and he took a deed in fee for the same. Winder and others obtained a charter from the Governor of the State in 1854-'55, for an incorporated company, called the Herron Mining Company, and the lands and mines were worked afterwards by that company. The bill alleges that previously to the sale to Winder, the plaintiff proposed to Mrs. Smith and her daughter, to take their share of the lands and mines, according to the provisions of the covenant, and offered them a full price for them, but they refused to let him have them; that he has made offers to Winder, and to the Herron Mining Company, to pay them what they gave for the premises, and take the whole property, but they have refused to comply with this request.

The bill was filed on 24 September, 1857, and insists that the plaintiff is entitled, according to the terms of the contract of 1843, to have his election to take the whole of the lands, etc., purchased from the Smiths by Winder, and sold to the corporation at the price the latter gave for them; and he now elects, and prays the Court to decree him a conveyance of the premises by the said Herron Mining Company; also, an account from the executors of R. Smith of his share of the rents and profits derived from the property by him in his lifetime, and an account of the same from Mrs. Smith and her daughter while they had and used them; also, from Winder and the Herron Mining Company since they have come into possession.

The answers of the several defendants were filed, but it is not necessary to notice more of their contents, than that they insist (127) on the statute of limitations in bar of the accounts asked for, all the time pleading three years before the filing of the plaintiff's bill. Also, Mrs. Smith and her daughter say that at the time of the sale to Hepburn, it was expressly agreed that the mill and mill site should remain the property of Smith exclusively, and should be excepted from the conveyance by him to Weisman and Hepburn, and that by the agreement of all parties, an instrument of writing was drawn up to that effect, which the plaintiff promised to sign, but that he suddenly left the city of Raleigh and returned to Philadelphia, and that another portion of four acres was to be exempted for a church.

Graham and *G. W. Haywood,* for the plaintiff.
Mason and *B. F. Moore,* for defendant Winder.
Miller, for the Smiths.

PEARSON, C. J. 1. The plaintiff is not entitled to a specific performance of that part of the agreement executed by him and Richard Smith on 21 January, 1843, in which it is stipulated that if either party should wish to sell, he shall give the other "the refusal," or what was aptly called on the argument, "the right of preëmption."

We are inclined to the opinion that a court of equity could not have interfered to compel a specific performance between the *original* parties. Such stipulations are against public policy, and operate in restraint of alienation; for which reasons they are not favorites, either in courts of law or courts of equity. At law, an understanding of this nature is not treated as a grant of an easement or privilege, or as a condition, so as to be attached to the land in respect to which it is made, but merely as a collateral personal covenant, for a breach of which the party may be entitled to an action for damages; *Blount v. Harvey,* 51 N. C., 186; *Keppel v. Bailey,* 2 Mylne & Keene, 577, where it is said: "Incidents of a novel kind can not be attached to property at the fancy or (128) caprice of any owner," because "it is clearly inconvenient to the science of the law that such a latitude should be given"; "great detriment would arise, and much confusion of rights, if parties were allowed to invent new modes of holding and enjoying real property, and to impress on their lands a peculiar character which would follow them into all hands, however remote."

Considerations of this kind apply as forcibly in equity as at law; consequently, the Court should not treat such agreements as creating a trust, binding the parties and privies to a specific performance, but should leave the party aggrieved by breach thereof to his remedy at law. If one takes land in fee simple, and covenants not to alien, a court of equity will not interfere by injunction to prevent him from doing so, but will leave the party to his remedy at law. This is clear. The covenant under consideration is, in effect, a modified agreement not to alien, and falls under the like reason.

We are also inclined to the opinion that the effect of the sale by Weisman to Hepburn, with the concurrence of Smith, of one-half of his interest in the lands, and of the deed executed by Smith to Weisman and Hepburn, vesting in them, as tenants in common, the legal right to one undivided moiety of the lands, made such a change in the relation of the parties as to annul and supersede the stipulation which had been made between Weisman and Smith in respect to the right of preemption. It was based on the footing of the copartnership, and was an

emanation of the idea entertained by the parties of a "grand monopoly" in respect to the mines, which suggested that if one of the parties should ever wish "to withdraw from the said concern," it was highly probable that the other party would desire to become the owner of *the whole*, and the stipulation was made to enable him to possess himself of the monopoly. The firm, which was known under the name and style of "Smith & Weisman," was dissolved by the transactions above referred to, and it is fair to infer that the idea of a monopoly was abandoned and passed away when the firm ceased to exist; for no allusion is (129) made to this stipulation in Smith's deed, and Hepburn is not required to become a party to it, although he acquired one-fourth of the land as a tenant in common. All mutuality was in this way destroyed, and the fulfilment of the stipulation was, in fact, rendered impracticable. Was Weisman, owning one-fourth, entitled to a preëmption right in respect to the whole of Smith's half? Or only to one-half of that half? Did Weisman communicate to Hepburn an interest in the preëmption, so as to give him the right as to one-fourth, both in respect to Smith and Weisman? Was Smith bound to offer the refusal to Weisman alone? Or to Weisman and Hepburn jointly? Or to them severally, each one-fourth? And, *per contra,* had Smith a preëmption right as against Weisman alone, or Weisman and Hepburn jointly? Or the two severally? The parties have not enabled the Court to answer these questions. The absence of any provision for this new state of things raises a presumption that the stipulation in question was treated and considered by all parties as being defunct.

We are of opinion that upon the death of Mr. Smith, the stipulation did not follow the land and bind his devisees in respect to it, so as to entitle the plaintiff to enforce it against them or their assignees. It could only have this effect by giving it the character *of a trust.* We can conceive of no ground to clothe it with this character. On the contrary, the considerations above suggested tend to show that the Court would not allow it to be so treated, except as between the original parties, even if an intention to make it a trust had been expressed by the terms of the agreement.

The clause whereby the parties "bind themselves, their heirs, executors, administrators and assigns, to the strict observance of this article," has no further effect than the same words added to a bond for the payment of money. It may be that the plaintiff can maintain an action at law against the personal representatives of Smith, or his real representatives—that is, his devisees, for breach of this covenant, but there is no ground on which he can treat a purchaser as holding in trust for him; because no trust was created in his favor by the (130) original agreement.

2. The plaintiff is entitled to a declaration in the decree, that he owns one-fourth of the legal and equitable estate in all the lands set out in the deed executed by Smith to Weisman and Hepburn, 1 February, 1850, free from an incumbrance or lien by reason of the mortgage executed by himself and Hepburn to Smith, and to a further declaration that the mortgage debt has been satisfied, and to a decree for a reconveyance. This equity was yielded by the defendants on the argument, except as to four acres of land, which, it is alleged, are given to the church, and four acres on which the mill is situated. In respect to which they allege a cross equity to have a specific performance of an agreement to convey the same to Smith, executed by Weisman and Hepburn. Whether the defendants will be able to establish the cross equity, or whether it can be met by the plaintiff on the ground that it was obtained without consideration, and by the undue exercise of the influence which Smith held over them by reason of his being a creditor, and having them in his power, or will, at all events, be allowed only to the extent of giving a lien on the mill as a security for the amount expended by Smith in the erection of the mill, are questions into which we will not now enter, because they are not presented in a proper manner by the pleadings. Where the defendant has an equity, he must set it up by a cross bill. This is a well settled rule of the Court. The decree, however, in this case will be so framed as to be without prejudice to this equity of the defendants, so as to enable them, if so advised, to seek to have it set up by an original bill, when the matter can be fully presented without being attended by the complication and confusion that a cross bill filed in this case would necessarily have produced, considering the very voluminous pleadings and exhibits relevant to the several equities which the plaintiff seeks to enforce.

3. The plaintiff's right to an account against the personal representatives of Smith is barred by the statute of limitations. It is true
(131) that, as between copartners and tenants in common, the statute of limitations does not run until, as HENDERSON, C. J., expresses it in *Wagstaff v. Smith,* 17 N. C., 264, "There is a *cesser* of the privity or connection from which the accountability arises." In that case, and in *Northcott v. Casper,* 41 N. C., 303, the relation of the parties was not changed, but in our case, on the death of Smith, there was a change in the relation of the parties. Smith, of course, could no longer be a copartner, or a tenant in common, and consequently, an action accrued for or against his personal representatives to have an account of the profits received, which action is barred by the statute; for, although his wife and daughter acquired his estate as devisees, the estate passed to them as assignees, and the relation which had previously existed between him and the plaintiff was of course at

an end. So, the right of action in respect to the profits accrued at that time; for there was "a *cesser* of his privity or connection as tenant in common," a new relation then commenced between him and the devisees, and the case is the same as if one tenant in common sells. That is, a *cesser* of his relation as tenant in common; and a cause of action then accrues to all of the tenants in respect to the arrearages of profits, and a new relation begins between the other tenants and the purchaser.

The bill was filed 24 September, 1857. Mrs. Smith and Miss Mary sold to Winder 20 *April*, 1854, at which time there was a *cesser* of the connection with the plaintiff as tenant in common. So the plaintiff's right to an account against them is barred, except from 24 September, 1854. For all profits or moneys received for or on account of, or out of the lands after that date, he is entitled to an account as against Mrs. Smith and Miss Mary, and the defendant Winder and the Herron Mining Company. How far the fact that the developments of lead ore cropped out in so many places, and the quantity of wood was so great as to leave ample room for all the tenants in common to come and take their share, distinguishes that species of profits from the receipt of rent, either in money or produce paid by the lessees of the several houses and cleared pieces of ground in the many tracts of land, is (132) a question which may be presented by exception to the account.

PER CURIAM. Decree accordingly.

DAVID MOORE and others v. DANIEL MOORE, Executor.

In determining whether a limitation of property does or does not amount to a perpetuity, regard is had to possible, not actual, events, and the fact that the gift might have included objects too remote, is fatal.

CAUSE removed from the Court of Equity of CALDWELL.

Jesse Moore died in the said county, leaving a last will and testament, in which, after making various specific devises and bequests, the testator proceeds: "Item 7. My will is that all the rest of my property of every description, and my money, be kept by my executor, whomsoever I map appoint; it shall be kept as a fund. Should any of my children or grandchildren come to suffering, in any other way, save by idleness, drunkenness, or anything of the kind, so as to become an object of charity, I want the said executor to give a part of this to such child or grandchild."

The bill is filed by the next of kin of the testator, and prays for a distribution of this fund amongst them, upon the ground that the bequest is an attempt to create a perpetuity, and therefore void.

The cause being set for hearing upon bill, answer and exhibit, was transferred to this Court by consent.

Mitchell, for the plaintiffs.
No counsel for the defendant.

(133) BATTLE, J. Upon the best consideration which we have been able to give to this case, we are clearly satisfied that the bequest contained in the seventh clause of the testator's will can not be sustained. It is an attempt to create a fund and keep it in existence for a purpose which *may* not be finally accomplished for a period longer than that which the rule against perpetuities will allow. Whether the administration of this fund by the executor as "treasurer" is to be deemed a power or trust in him, the necessary effect of it will be that the fund will be tied up and kept from commerce during the entire lives of the testator's children and grandchildren, which it is manifest may be, and probably will be, much longer than a life or lives in being at the testator's death, and twenty-one years afterward. This makes the bequest void, although it might happen that all the grandchildren would die within twenty-one years after the death of all the testator's children. In a case of this kind, it is well known to be "an invariable principle in applying the rule under consideration, that regard is had to possible, not actual, events, and the fact that the gift might have included objects too remote, is fatal to its validity, irrespectively of the event." In the present case, it is plain that the gift of the fund *might* be needed by the objects of the testator's bounty for some time after the time allowed by the rule against perpetuities, that is, after twenty-one years from the death of the last survivor of the testator's children; see 1 Jarman on Wills, 227 *et seq.,* where the subject is fully discussed and explained; see also 2 Rop. on Leg., 298 *et seq.*

In deciding against the validity of the bequests upon the ground that it violates the settled rule on the subject of perpetuities, we do not intend to give or intimate an opinion whether the objects of the intended charity are sufficiently definite, or the manner in which they are to be ascertained is pointed out with sufficient precision.

The plaintiffs are entitled to a decree according to the prayer of the bill.

PER CURIAM. Decree for the plaintiffs.

(134)

W. H. KNIGHT, Ex'r., v. F. H. KNIGHT and wife, and others.

1. Where a testator gave property, real and personal, specifically, and then devised and bequeathed all the "balance of his estate" to certain parties in general terms, and after making his will, the testator acquired property, real and personal, it was *Held*, that this after-acquired property fell into the residium bequeathed generally, and that upon a deficiency of funds provided for the payment of debts, the after-acquired personalty was first liable.

2. Personalty in the hands of an executor or administrator, whether bequeathed specifically or otherwise, is first liable to the payment of debts, unless specifically exempted, and the real estate belonging to the deceased, whether descended or devised, is not liable until the former is exhausted.

CAUSE removed from the Court of Equity of EDGECOMBE.

The plaintiff in this suit is the executor of the last will and testament of Jesse C. Knight, and the bill is filed to obtain from the Court a construction of the said will. In the ninth clause of the will the testator bequeaths and devises as follows:

"Item 9. All the balance of my estate and effects, with all money or moneys due, I wish to be disposed of according to items third, fourth, fifth and sixth, except such perishable effects as he shall be deemed best to sell, which he shall sell on a credit of six months, with interest; and after paying all my debts and expenses of administration, the balance of the proceeds shall be distributed by the several items."

By item 3 of the will, the testator gave to W. H. Knight certain lands and personal property on certain conditions and limitations. By item fourth, he gave property, real and personal, to Sally Knight, on certain limitations. By item fifth, he gave property to W. H. Knight for the sole and separate use of Martha A. Lawrence, wife of A. B. Lawrence. By item sixth, he devised and bequeathed property to Susan, wife of A. B. Nobles.

After the making of the will, the testator acquired several tracts of land, and also a considerable amount of personal (135) property.

The plaintiff shows from an account filed that the notes and proceeds of the perishable property will be insufficient to pay the debts of the testator, leaving, after these are exhausted, debts to the amount of $11,315.54, to meet which deficiency some of the legacies will have to abate. It is for the purpose of obtaining the direction of the Court as to which of the legacies shall abate that this bill is filed.

The cause being set for hearing upon the bill and answer, was sent to this Court by consent.

Bridgers and *Rodman*, for the plaintiff.

No counsel appeared for the defendant in this Court.

MANLY, J. Upon a consideration of the contents of the will of Jesse C. Knight, we are of opinion, in the first place, that the property acquired subsequently to the making of the will, falls into the residuum spoken of in the ninth clause. According to the provisions of the statute of 1844 concerning wills, embodied in the Rev. Code, ch. 119, sec. 6, a will in reference to the real and personal estate comprised in it, speaks and takes effect as if it had been immediately executed before the death of the testator, unless a contrary intention appear from the will. As nothing appears to rebut this legal construction, its effect, in the case before us, is to throw the after-acquired lands as well as personalty into the residuum.

In the second place, we are of opinion that the *personalty* of the residuum is the fund primarily liable to the payment of debts. It is in all respects a true residuary fund not specifically bequeathed, but disposed of in general terms to a class of legatees.

It appears from a summary statement of the executor that the aggregate amount of unpaid demands against the estate is $11,315.54.

We take it for granted the residue of personalty will not be sufficient to satisfy this amount, and have considered the will with reference
(136) to the fund next liable, and conclude, in the third place, that the legacies of personalty must abate. These legacies all appear to be specific, and they must, therefore, abate ratably.

Since the statute of 1846, Rev. Code, ch. 46, sec. 44, the personalty in the hands of an executor or administrator, whether it be bequeathed specifically or otherwise, is first liable to the payment of debts, unless specifically exempted; and the real estate belonging to the deceased, no matter in what condition it is found, whether descended or devised, is not liable until the former is exhausted; *Graham v. Little,* 40 N. C., 407.

By operation of the wills act of 1846, the lands acquired by Jesse C. Knight subsequently to the making of his will, pass under the residuary clause. The distinction in this respect between real and personal property, theretofore existing, is thus abolished; and both pass alike under a bequest of the residue. What would have been the effect of this without our act of 1844, prescribing the order in which real and personal property shall stand in their liability to pay debts, it is unnecessary to enquire. By that act, personalty is put in the front, and we accordingly hold that the specific legacies of personalty must abate.

PER CURIAM. Decree accordingly.

Cited: Wiley v. Wiley, 61 N. C., 134; *Saunders v. Saunders,* 108 N. C., 330; *University v. Borden,* 132 N. C., 489.

(137)

R. M. WHITFIELD and wife and others against JAMES H. CATES.

1. Where there is no allegation of fraud, imposition, oppression, or mistake, the court will not set up a parol agreement, and declare an absolute deed to be a mere security for money advanced.
2. Where a valuable consideration has been paid by the person to whom an absolute deed for slaves is made, the allegation of a parol trust in favor of a third party, forms no exception to the rule in courts of equity, in respect to declaring such a deed a mere security for money loaned.
3. Although a plaintiff may fail as to the principal equity he seeks to establish, he may fall back on a secondary equity, provided it is not inconsistent with the principal equity, and the allegations in the bill are sufficient to raise it.

CAUSE removed from the Court of Equity of PERSON.

The bill is filed by R. M. Whitfield and his wife, Susan, and his children, alleging that the said R. M. Whitfield was improvident, and being desirous to provide for his wife and children, the said other plaintiffs, he made a conveyance, dated March, 1840, of seven slaves (naming them), being all the slaves he owned, for the consideration, expressed in said conveyance, of $750; that said conveyance was made upon the express understanding and agreement that the defendant was to hold the slaves for the benefit of, and in special trust and confidence for, the wife and children of the said R. M. Whitfield, and that they were to have the privilege of redeeming the same at any time by paying him whatever amount he might advance of the $750, with interest; that the defendant paid, at the time, $330 in cash, and gave up a note he held on the said R. M. Whitfield for $70, making in all $400, and executed a bond for $350, the balance of the $750; that some short time thereafter, in the absence of the plaintiff R. M. Whitfield, the defendant prevailed on his wife, the plaintiff Susan, to give him up the bond for $350, alleging as a reason for her so doing the improvidence of her husband; that he being a relation and a professed friend, she had entire confidence that he would deal fairly with the plaintiffs in respect to the said bond; that the said slaves were worth at least $1,300 at the time; and that the said amount of $400 was all that defendant has ever paid toward said slaves; that the defendant did not take possession of the slaves at first, but a short time after the contract he came for them, and, under a pretense set up by him that it was necessary to keep off creditors, for him to take possession of the property, and believing in the sincerity of his purposes, the plaintiffs consented for (138) him to take the slaves into his possession, except one, which remained in the possession of the plaintiffs; that afterwards he sent them all back to plaintiffs, who kept possession of them for six or seven years; that some eight or ten years ago, under the like delusive promises and assurances, he again got possession of the slaves, except the same one

which had formerly remained with them; that by the same kind of delusive statements and professions of kindness and affection, he lulled the suspicions of the plaintiffs, and did, from time to time, put them off when they called upon him to redeliver the slaves to them, and otherwise perform the trust he had undertaken in behalf of the wife and children; that about a year before the filing of the bill, the defendant had the said conveyance registered, and has since then set up claim to the absolute right to the slaves. The bill, among other interrogatories, calls on the defendant to answer as to the said bond for $350, whether the same has ever been paid to plaintiffs, or either of them, or to any one else? and if so, when? and where? and to whom?

The prayer is that the defendant may be declared a trustee in behalf of the wife and children, and that an account may be taken of the amounts paid and of the hires of the said slaves, and for general relief.

To this bill the defendant demurred. There was a joinder in demurrer, and the cause set down for argument, and sent to this Court.

Reade and *Fowle,* for the plaintiffs.
Graham, for the defendant.

PEARSON, C. J. The principal equity which the bill seeks to enforce is the ordinary case of converting a deed absolute on its face into a security for money, by parol proof of an agreement to that effect.

There is no allegation of fraud, imposition, oppression or mistake, which is necessary in order to bring the case within the applica-
(139) tion of that doctrine, as has been decided over and over again by this Court. On the argument, it was insisted that this case differs from the ordinary one, for here the bargainee, upon repayment of the money, was not to reconvey to the bargainor, but was to convey to *his wife and children,* in whose favor the trust was declared, and *Shelton v. Shelton,* 58 N. C., 292; *Riggs v. Swann, ante,* 118, were relied on. The position that this is the case of parol evidence to establish a declaration of trust as distinguished from a *condition,* is not tenable, and the cases cited have no application. The defendant paid a part of the purchase money and secured the balance by note. This *raised a use for him,* and when the legal estate passed, the two united so as to give him the estate, both legal and equitable, and by the force and effect of the deed, he became the owner to all intents and purposes. The purpose of the parol evidence is to show an agreement by which his estate was to close, and he was to hold in trust for the wife and children of the bargainor on repayment of the purchase money; which is neither more nor less than a condition, by which his principal estate was to be defeated; in other words, a deed, absolute on its face, and vesting in the bargainee an absolute estate, is to be converted into a security for money,

and upon his estate being defeated, he is directed to convey to the wife and children of the bargainor, instead of the bargainor himself, which is a distinction without a difference, for, in either case, an absolute estate is defeated by parol evidence. In *Shelton v. Shelton,* a grandmother *paid the purchase money,* and instead of taking the title herself, directed the title to be made to A, and, by parol, made a declaration of the trust in favor of her grandchildren. By force and effect of the deed. A acquired only *the legal estate,* and a trust would have resulted to the grandmother, by reason of her having paid the price, so the effect of the parol declaration was simply to *direct the trust* from herself and give it to the grandchildren.

In *Riggs v. Swann,* a father had mortgaged two slaves. The mortgagee agrees to take one of the slaves, absolutely, in satisfaction of the debt, and reconvey the other. The father directs the title (140) to be made to A, and, by parol, makes a declaration of the trust to wit, A is to hold in trust until the hire pays off a debt due him, and then in trust for two of the children of the mortgagor. A had paid nothing for the slave, and but for the declaration would have held the legal title, in trust, for the father. So, the effect of the declaration was simply to divest *the trust* from himself and give it to the two children after a debt was paid.

In these cases, the person to whom the deed was made never had the use or equitable estate, and the effect of the deed was simply to pass to him the legal title. But in our case the defendant, by force of the deed, acquired absolutely both the legal and equitable estate, and the attempt is, by parol evidence, to defeat his estate. "Note the diversity."

Although the plaintiffs have failed to establish their principal equity, there is a secondary equity disclosed by the bill. It is alleged that the defendant induced the wife of the plaintiff to give up to him the note for $350, which he had given to secure the balance of the purchase money, without paying anything for it, and under the delusive assurance that it was best for her to do so, because of the improvidence of the husband. So, the defendant holds the note thus fraudulently procured to be surrendered to him, and has never paid the amount due thereon. The demurrer admits these allegations and the fraud charged. It follows that it can not be sustained in respect to this note, and being bad as to part of the bill, it is bad as to all, according to a well settled rule of this Court.

It is also well settled that although a plaintiff may fail as to the principal equity which he seeks to establish, he may fall back on a secondary equity, provided it is not inconsistent with the principal equity, and the allegations in the bill are sufficient to raise it. It is certainly not inconsistent with the main purpose of the bill for the

plaintiffs, failing in that, to insist that the defendant should, at least, pay the full price, which he agreed to give, and not avail himself of a fraud in procuring the surrender of the note, which he had
(141) executed as security for a part of it, and the allegations are made with sufficient certainty.

PER CURIAM. Demurrer overruled.

Cited: Shields v. Whitaker, 82 N. C., 521; *Knight v. Houghtaling,* 85 N. C., 34; *Wilkie v. Womble,* 90 N. C., 255; *Davis v. Ely,* 100 N. C., 284; *Gorrell v. Alspaugh,* 120 N. C., 367; *Hughes v. Pritchard,* 122 N. C., 62.

J. H. JACKSON and wife and others against E. H. RHEM, Jr., Adm'r, and others.

Where a man and woman live together as man and wife, and are so reputed in the neighborhood, up to the death of one of the parties, and have children which they treat as legitimate, a court will not declare against the marriage except upon the most overwhelming proof that there was no marriage.

CAUSE removed from the Court of Equity of LENOIR.

This was a petition for a distributive share, and it sets out that Edward Rhem, late of the county of Craven, died intestate in the year 1855, and left a large personal estate, which went into the hands of the defendant E. H. Rhem, Jr., as his administrator; that Edward Rhem left no children, but left surviving him a brother and a large number of nephews and nieces, children of deceased brothers and sisters, among which latter class are the *feme* plaintiffs in this suit, who are the children of Melchor Rhem, a deceased brother of the testator, Edward Rhem; and that representing their deceased father, they are entitled to a distributive share of the estate of the said Edward Rhem, deceased.

The defendants, in their answers, deny that the *feme* plaintiffs are entitled to represent their deceased father in the distribution of the said estate, being, as the answers allege, illegitimate children. Testimony was taken on both sides, from which it is apparent that Melchor Rhem and the mother of the *feme* plaintiffs lived together for twenty years as man and wife, and were reputed as such in the neighborhood, but there was no evidence that they had been actually married.
(142) A copy of a marriage bond, certified by the Clerk of the County Court of Lenoir, was produced, which bond recited that Melchor Rhem had obtained license to marry Alice Davis, the mother of the *feme* plaintiffs.

Several witnesses testified that they had heard Melchor Rhem say on

several occasions, both before and after the death of his reputed wife, that he had never married her.

The cause being set for hearing upon bill, answer, exhibits and proofs, was sent to this Court by consent, and after argument here, the Court directed issues to be tried in the Superior Court of Lenoir:

1st. Were the said Melchor Rhem and Alice Davis ever lawfully married?

2d. Were the plaintiffs, or either of them, born in lawful wedlock?

These issues were submitted to a jury, who found both in favor of the plaintiffs. Which finding was certified to this Court, and at this term the defendants' counsel moved the Court to dismiss the plaintiffs' bill, notwithstanding the verdict, or to order another trial of the issues, on the ground that the verdict is against the weight of the evidence.

Stevenson, for the plaintiffs.
J. W. Bryan and *G. Green,* for the defendants.

BATTLE, J. The issues made by the pleadings in this case were, first, whether the defendant, E. H. Rhem's intestate, Melchor Rhem, was ever lawfully married to the mother of the *feme* plaintiffs, and if so, were the said *feme* plaintiffs born in lawful wedlock? Upon these disputed questions of fact, the testimony was so conflicting, and it was so doubtful on which side the weight of it preponderated, that we felt unwilling to decide it without the aid of the verdict of a jury of the county where the alleged man and wife had lived. Issues for that purpose were, accordingly, under an order of this Court, sent down to be tried in the Superior Court of Law for that county; and upon the trial there had, the jury have found both issues in favor of the plaintiffs, of which a certificate has been properly transmitted to us. The counsel for the defendants have appeared in this Court and (143) moved us, upon a consideration of the testimony, to render a decree dismissing the plaintiffs' bill, notwithstanding the verdict, or to order another trial of the issues, upon the ground that the verdict on the first trial is decidedly against the weight of the evidence. We do not feel at liberty to grant either alternative of the defendants' motion. We are of opinion that when a man and woman have lived together for many years, treating each other as man and wife, and have been so reputed to be in the neighborhood where they lived during all the time in which they thus cohabited; and where they have had children which were treated by the parents as legitimate, up to the death of the latter, we think that the testimony which should induce a Court to declare against the marriage of the parties, and thereby to bastardize their issue after their deaths, ought to be so overwhelming as to leave not a doubt about the facts thus declared. It was a well known rule of the

ecclesiastical law, that if two persons who labored under canonical disabilities intermarried with each other, the marriage could not be declared to have been void after the death of both or either of the parties. That rule does not prevail in our law, because we do not recognize the ecclesiastical as part of our common law of marriage, but the principle upon which it was founded, that the validity of a marriage ought not to be questioned after the parties, or either of them, have by death been deprived of the opportunity of supporting it by proof, may well influence our Courts in deciding upon the existence of a marriage and the legitimacy of issue after the death of both or either of the parents.

Our opinion is, that the plaintiffs are entitled to a decree declaring the facts found by the issue, and for the relief consequent thereon.

PER CURIAM. Decree accordingly.

Dist.: Ferrall v. Broadway, 95 N. C., 555; *Berry v. Hall,* 105 N. C., 165.

(144)

THE ATTORNEY-GENERAL against JEREMIAH N. ALLEN.

1. After a cause is in this court and the party is ready to have it heard, a motion to dismiss, for want of a prosecution bond, will not be entertained.
2. Chapter 99, section 8, Revised Code, which directs the tax on legacies to strangers in blood, imposed by the preceding section, to be retained by the executor or administrator "upon his settlement of the estate," and directs the tax to be paid into the clerk's office, has reference to his settlement with the individual to whom the legacy is bequeathed, and not to the final settlement of the estate, and the tax must be paid into the office on the settlement with the legatee.

CAUSE removed from the Court of Equity of CRAVEN.

This was a bill of information, filed by William A. Jenkins, Attorney-General, against the defendant, Allen, who is the administrator *cum testamento annexo* of Isham Jackson, deceased. It alleges that, by his will, Isham Jackson bequeathed a considerable pecuniary legacy to a natural son, one Daniel Jackson; that by the revenue law of North Carolina, a tax of three *per cent* upon this legacy is due the State, which sum the defendant has failed to pay over upon demand.

The answer admits the material facts averred in the bill, and states the amount of the legacy in question to be $632.84, upon which the tax amounted to $18.98. This sum defendant paid into the Clerk's office on 20 October, 1860, more than six months after the bill was filed. The defendant alleges that, by the terms of the statute upon revenue, he was not bound to retain and pay over the tax until the final settlement of the estate, which final settlement had been delayed by the pendency of a suit against him as administrator.

The eighth section of the ninety-ninth chapter of the Revised Code, upon the construction of which the case is made to turn, is in the following words, viz.:

"The executor or administrator of every such deceased person, on his settlement of the estate, shall retain out of the legacy or distributive share of every such legatee or next of kin, the tax properly chargeable thereon; and in case he may have sold any real estate, and there shall be any surplus in his hands, not needed to pay debts and charges, he shall retain the proper tax of each person entitled to such (145) surplus; which taxes he shall pay to the Clerk of the Court of Pleas and Quarter Sessions of the county wherein the will was proved or administration granted."

The cause being set for hearing upon bill and answer, was sent to this Court by consent.

Henry C. Jones, for the plaintiff.
J. N. Washington, for the defendant.

PEARSON, C. J. 1. The motion to dismiss for want of a prosecution bond, made in this Court, is not allowed. Such matters should be attended to in the preliminary stage of a suit. After a case is in this Court and the party is ready to have it heard, a motion to dismiss for want of a prosecution bond is "behind time."

2. The objection, which is faintly made by the answer, that an illegitimate son is not "a stranger in blood," was properly abandoned on the argument.

3. The point made on the construction of the statute, Rev. Code, ch. 99, sec. 8, is against the defendant. "On his settlement of the estate," taken in connection with the words, "shall retain out of the legacy or distributive share of every such legatee or next of kin," does not refer to a final settlement of the estate, but to his settlement, so far as the legatee or distributee is concerned, out of whose legacy or share the tax is to be retained. When an administrator, as in this instance, pays over a legacy and retains out of it the amount of the tax, for what purpose should he keep it in hand until there can be a "final settlement" of the estate? *Cui bono,* except to tempt him to apply the amount (which would otherwise be idle in his pocket) to his own use?

4. It appears by the exhibit filed that the defendant paid the amount of the tax to the County Court Clerk on 20 October, 1860, but the bill was filed March, 1860. So, the defendant is again "behind time"; for taking the matter as ground against a further prosecution of the suit, in order to be a bar, it should have been accompanied (146) by the payment of all costs up to that date. The plaintiff will have a decree for the amount of the tax (to be satisfied by the money

in the Clerk's office) and for his costs, which really seems to be the point in the case.

We will take occasion to say that the payment of taxes is a duty which every good citizen ought to attend to. If he is remiss in regard to it, he has no right to object to a "bill of cost." The State is not, and ought not to be, required to be at the expense of having an agent to make a demand in each and every case. Every good citizen should be prompt to pay his taxes.

PER CURIAM. Decree accordingly.

JOHN C. JOHNSTON against JOHN B. CHESSON, Jr., and others.

Under the statute of distributions in this State, Rev. Code, chap. 64, secs. 1 and 2, representation is not admitted among collateral kindred after brothers' and sisters' children, and, consequently, uncles and aunts of an intestate take to the exclusion of the children of a deceased uncle.

CAUSE removed from the Court of Equity of WASHINGTON.

The bill is filed by the administrator of Otis W. Chesson, and prays the instruction of the Court as to his duty in the administration of the estate. He sets out that his intestate left him surviving an uncle, one Nathaniel C. Chesson, an aunt, Sarah Chesson, who has since married one Swain, and a cousin, John B. Chesson, Jr., son of a deceased uncle. The defendants in this suit are the uncles and aunts and the said John B. Chesson, Jr., who claims an equal share with his uncle and aunt in the estate of the intestate. The cause being set for
(147) hearing upon bill and answer, was transferred to this Court by consent.

H. A. Gilliam, for the plaintiff.
Winston, Jr., for the defendant.

BATTLE, J. The bill is filed for the sole purpose of obtaining the decision of the Court upon the question whether, in the distribution of the personal estate of an intestate, the son of a deceased uncle can, by right of representation, claim an equal share with an uncle and aunt, who are the nearest of kin to the intestate. This question is settled by the express words of our act of distributions, which says that in the case of an intestacy, "if there be neither widow nor children, nor any legal representative of children, the estate shall be distributed equally to every of the next of kin of the intestate, who are in equal degree, and to those who legally represent them," with a *proviso* "that in the distribution of the estate there shall be admitted among the collateral kin-

dred no representative after brothers' and sisters' children"; see Rev. Code, ch. 64, secs. 1 and 2. There was a similar provision in the English statute of distributions of the 22d Charles II, and it has always been held that among the uncles and aunts and other more distant kindred of an estate, there could be no right of representation allowed; 2 Williams on Executors, 930. In the rules of the descent of real estate, the right of representation is indefinite, as well among collateral as lineal kindred; see Rev. Code, ch. 38, sec. 1, rule 3. This has always been the law, both in England and in this State (see *Clement v. Cauble,* 55 N. C., 82; *Haynes v. Johnston,* 58 N. C., 124), and in consequence of it the real estate of an intestate will often devolve, in part, upon a person who can not take any portion of his personal estate. The law upon the subject has been so long and so firmly established that it is unnecessary for us to attempt an explanation of the reasons upon which it was originally founded.

PER CURIAM. Decree accordingly.

Cited: *Nelson v. Blue,* 63 N. C., 660.

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(148)

ANDREW S. MASON and another against DEMPSEY B. SADLER, Adm'r.

Where a testator bequeathed as follows: "I lend to my wife, during her life, all my negroes (three in number) for the purpose of raising and educating my two sons," which was but a reasonable share of her husband's estate, and gave in the same will, in appropriate terms, to his wife, as guardian to his two sons, the remainder of his estate, it was *Held,* that the former clause conferred upon her, for life, a beneficial interest in said property, with a recommendation in behalf of the two sons.

CAUSE removed from the Court of Equity of HYDE.

Osborne Foy Mason, by his will, dated 14 January, 1841, bequeathed as follows: "First, I lend to my wife, Polly, during her life, all my negroes, to wit, Charles, Clarissa and Betsy Ann, and their increase, for the purpose of raising and educating my two sons, (Andrew) Shanklin and Ausbond, * * * and for her year's provision, one hundred and twenty dollars." "I give and bequeath to my two sons, Shanklin and Ausbond, at the death of my wife, Polly, all my negroes, viz., Charles, Clarissa and Betsy Ann, and their increase," with contingent limitations over.

"All my perishable estate, except such that I have allotted to my widow, I wish to be sold on a credit of six months, and at the expiration of two years, after proving the will, I wish my executor to pay over to my widow, as guardian of my two sons, all the funds on hand, for

the purpose of raising and educating my sons, and for the purpose of her providing them a dwelling and land to live upon."

By a codicil, he devises as follows: "The land I lately purchased of Joseph Swindell, I have lent to my wife her lifetime, and at her death I give and bequeath the same to my two sons, Shanklin and Ausbond." The bill asserts an equity in behalf of the two sons, Andrew Shanklin and Osborne (called in the will Ausbond), as arising to them from the first clause of the above will, and seeks to have the widow declared a trustee for their benefit in respect to the slaves therein mentioned. Mrs. Mason, the mother, lived on the land mentioned in the codicil (149) from 1841 to 1847, and in that year was married to one Richard Sadler. Before this marriage, one of the slaves mentioned in the will of Foy Mason, to wit, Clarissa, was sold by the administrator with the will annexed of her husband, for the payment of debts, and Mrs. Mason became the purchaser at four hundred dollars; of this sum, she paid out of the money arising to her from her husband's will, for her year's allowance, $120, and some further amount out of the money arising from the hire of Charles. The unpaid balance of this note was discharged by Sadler, the second husband. While residing on the land left her by her husband, the plaintiffs, who were small, lived with her, and did some light work, and afterwards, when she married, they went with her to the dwelling of her second husband and spent some year or two in that family, sometimes working in the crop. They afterwards lived at other places in the neighborhood and worked. Sadler, the second husband, took all the slaves into his possession, and kept them during the lifetime of his wife; after her death, which occurred in 1850, he delivered Charles and Betsy Ann to the guardian of the plaintiffs, but as to the woman Clarissa and her children, he retained them, insisting that, by the purchase of his wife and the payments made by her and himself, the absolute property in these slaves vested in him. The plaintiffs were not sent to school at all, and it appeared were, at times, badly clad, but this seemed to arise more from the straightened circumstances of the mother, during her widowhood, than from neglect or indifference. It took all that could be made by the hire of Charles and Betsy Ann to support the family in the condition mentioned. As to Clarissa, she soon had a family of small children, and added to the expense of the family. On the death of Richard Sadler, this suit was brought against his administrator for the recovery of Clarissa and her children, alleging that she had been paid for out of the hires of the said three slaves, which they said belonged to them; alleging, also, that they had never received the benefit of the said property, either in maintenance or education, or in any other way, and praying an account of the hires of the slaves while in the possession of the said

Richard Sadler, and of the Woman Clarissa and her increase (150) since his death.

The answer of the administrator of Richard Sadler insists that the beneficial use of the slaves belonged, by a proper construction of the will, to Mrs. Mason, and as such, the right to the two slaves, Charles and Betsy Ann, for his wife's life, vested in him, and as to Clarissa, she was his by his wife's purchase.

The proofs taken in the cause establish the facts of the case as stated.

The cause was set down to be heard on bill, answer and proofs, and sent to this Court.

Donnell and *Carter,* for the plaintiffs.

No counsel appeared for the defendant in this Court.

MANLY, J. The question presented by the pleadings is, whether the language used by the testator, Foy Mason, in the first clause of his will, creates a trust, in his wife, of Charles, Clarissa and Betsy, for the sons, Andrew and Osborne.

It seems that Clarissa was sold by the administrator to pay debts—bought by the widow and paid for, partly, by funds arising from the hires of the other slaves, and the object of the bill is to follow the fund and to hold the property in which it was invested as security *pro tanto.*

Thus, the equity of the bill rests upon the principle that the slaves loaned to the wife for life was a trust, solely for the benefit of the children during that term. Indeed, that is the leading allegation of the bill. This, we think, is a misconstruction of the will. Considering the clause in connection with the other bequests of the will, we are of opinion the wife, under the bequest, took an absolute legal estate, and that the words, "for the purpose of raising and educating my two sons," have not the effect to qualify that estate. Our interpretation is, that the words mean to give a reason for the gift, and in that way to suggest and (151) recommend a duty that was incumbent on her.

This construction is strengthened by reference to the terms of the provision, made in another part of the will, for the sons. It is there directed that certain property be sold, and after two years from the probate of the will, be paid over to his widow, *as guardian* to his sons, for the purpose of raising and educating them, etc. The language used in these clauses is so different that we can not suppose the testator meant the same thing. The inference is, that as the latter bequest was certainly intended for the benefit of the sons, the former was intended for that of the wife, with an admonition, as she had the means afforded her, to take care of the children.

It will be found, upon examination of the will, that if the wdiow takes no beneficial interest in the bequest of the slaves aforesaid, that a very

inadequate provision is made for her. This is contrary to the general tenor of the instrument, and to the dispositions towards the wife manifested in it. It would be calculated to provoke a dissent, inevitably, and the consequent disturbance of his arrangements, which he could not have desired or contemplated. The facts of the case show that with all the assistance given in the will, it was a hard struggle for her to keep the property together and maintain herself and family in the humblest manner. But a small portion—about $80—of the income from the slaves was devoted to the purchase of Clarissa, the balance having been paid by the application of her year's provision to that object, and by moneys furnished by her second husband, the defendant's intestate.

The term for which the property is given, it seems to us, is significant of the purpose of the testator. A loan for life is appropriate and usual in cases of gift for the donee's own use, but it is of rare resort where it is intended the donee shall hold for the benefit of others. It is not such language as would naturally be adopted for effecting a purpose of that kind.

There is no warrant, therefore, either in the language of the bequest or the intention of the testator, as gathered from the entire in-
(152) strument, for severing the beneficial interest from the legal estate.

The language in which the bequest is clothed is simply demonstrative, and amounts, at most, only to an injunction on the legatee to enjoy the property given in a particular manner.

This case is distinguished from *Little v. Bennett,* 58 N. C., 156. There, the *entire estate* of the testator was given to the wife to raise and educate the children, and to dispose of among them as she might think proper. This was held to confer a beneficial interest on both, which might be enforced in a Court of Equity. But it was placed expressly upon the ground that it could not be intended for herself alone, because there would then be nothing for the children; nor could it be intended for the children alone, because in that case, the mother would be left destitute, and, therefore, it was intended to be given to both. In the case before us, distinct provision is made for each, and we are of opinion the words annexed to the bequest for the wife do not confer upon the children rights that will be enforced by the Court.

PER CURIAM. Bill dismissed.

EDWARD WHITE and wife and others against JOSEPH HOOPER, Adm'r, and others.

1. A bill will not lie at the instance of the heirs, against the administrator of one who had executed a bond to make title, to enjoin the latter from making a deed to the obligee, upon the ground that he had not paid the purchase money, but fraudulently pretended to have had done so, and to nullify the contract. It would be the duty of the administrator, if the money, in such a case, was not collected, to enforce the payment, and he would be liable if he failed to do so.
2. The remedy of the heirs at law, in a case where the obligee had not paid the purchase money on a bond to make title, would be to file a bill against such obligee to compel a specific performance.

CAUSE removed from the Court of Equity of ROCKINGHAM. (153)

The bill is filed by the heirs-at-law of James D. Taylor, and sets forth that in 1834, their ancestor made a bond to convey a tract of land (describing it) to Anderson Crowder, whenever the purchase money for the same should be paid; that the said purchase money has never been paid; that the said Anderson was very poor, and was always unable to pay the sum agreed in said bond to be paid; that their ancestor died in 1839, and the said Anderson in.....; that no administration was taken on the estate of the said James D. Taylor until the defendant took out letters at August Term, 1856, of Guilford County Court, for the express purpose, as plaintiffs believed, of making a deed to the heirs of the said Crowder, on the assumption that the purchase money was paid to the said Taylor in his lifetime, and they say, by way of anticipation, that the defendants, the children of the said Crowder, are setting up certain mutilated bonds, from which the names of the obligor has been cut, which they pretend were given for the said land and paid and taken up by their ancestor in his lifetime; but that the same are feigned, and gotten up for the occasion. The prayer is that the administrator, Hooper, may be enjoined from making title to the premises, and that the said simulated papers may be surrendered for cancellation.

The defendants answered very fully, but as the merits of the equity as disclosed in the bill are alone treated of by the Court, a further notice of the pleadings is not necessary.

Morehead and *Gorrell,* for the plaintiffs.
Fowle, for the defendants.

MANLY, J. This is a bill filed by the heirs-at-law of James D. Taylor against the administrator and heirs-at-law of Anderson Crowder, to enjoin the administrator from making a title to the latter, upon the allegation that their ancestor did not pay for it. The bill admits that

Taylor executed a bond for a title, but alleges that the evidences
(154) of payment have been fraudulently procured or fabricated. The prayer is that a conveyance of the land may be perpetually prevented by an injunction; or, if already made, that the deed may be recalled and cancelled, and that the evidences of payment may be impounded.

We think the plaintiffs have mistaken their equity. Their ancestor having entered into the bond, the administrator, under the provisions of the Revised Code, ch. 46, sec. 37, is bound to carry it into execution according to its conditions. If the money has been paid, the administrator's sole duty is to make the title; if it has not been paid, his duty is to collect, and, thereupon, to make title. So that, in either case, he is charged with the specific execution of this testator's obligation.

The equity of the heirs-at-law of Taylor, according to the allegations of their bill, and upon the supposition that the purchase money was never paid, would be to call for a specific performance themselves, and not to nullify the contract altogether; or, in calling the administrator to an account, they would have a right to regard the failure to collect this debt, or the making title without requiring its payment, as a culpable negligence or waste in respect to his assets, and make him account for the same.

The above view of the case is taken upon the allegations of the bill alone, disconnected from the answers and proofs. It is due to the latter to say that they do not leave the merits of the bill unaffected.

The complainants are not entitled to the relief they seek, and the bill must be

PER CURIAM. Dismissed with costs.

Cited: Grubb v. Lookabill, 100 N. C., 271.

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(155)

WILLIAM C. SANDERLIN and wife against WILLIAM ROBINSON and others.

Where a woman and her intended husband, upon the eve of marriage, were induced by her brothers to sign a marriage contract, by which her property was to be conveyed to trustees in such manner as to deprive her not only of the right to dispose of the rents and profits thereof during coverture, but also of the right to dispose of the property itself, both during the coverture and afterwards, if she survived, and gave the ultimate remainder over after her death without issue, she being at the time advanced in life, it was *Held*, that such a contract, unless proved by the clearest testimony to have been fully understood and freely assented to by the intended wife, must be declared fraudulent as to her, and inoperative as against the husband, except so far as it can be presumed that he freely assented to it.

SANDERLIN *v.* ROBINSON.

CAUSE removed from the Court of Equity of NEW HANOVER.

The complainants in this suit being about to be married, the brothers of Mrs. Sanderlin, then Margaret Robinson, induced them to sign a deed of marriage settlement, conveying to trustees certain property, land and slaves, which was owned by Margaret Robinson absolutely. This deed is in the following words:

"STATE OF NORTH CAROLINA—New Hanover County.

"This indenture, made this the 1st day of July, in the year of our Lord one thousand seven hundred and fifty-eight, between Margaret Robinson, of the State and county aforesaid, of the first part, and William Sanderlin, of the State and county aforesaid, of the second part, and William Robinson and John A. Corbitt, of the State and county aforesaid, of the third part, witnesseth: That whereas, a marriage is about to be solemnized between the said Margaret Robinson and William Sanderlin, and it is agreed by and between the said Margaret Robinson and William Sanderlin, that if the said marriage should take effect, then, notwithstanding the said marriage, he, the said William Sanderlin, his heirs, executors, administrators or assigns, shall not intermeddle with or have any right, title or interest, in law or equity, in or to any part (156) of the estate, real, personal or perishable, now belonging to Margaret Robinson. Now, this indenture witnesseth, that for the making of the said agreement good and effectual in law, and for the keeping and preserving the several estates above mentioned, to and for the separate use of her the said Margaret Robinson during her life, and should she die without issue, then the estate to return to her present heirs, before the marriage, and so that the same shall not be in the power or disposal of the said William Sanderlin, or liable to the payment of his debts and incumbrances, he, the said William Sanderlin, doth, for himself, his executors and administrators, covenant, promise and agree that all the profits or increase that hereafter shall be made of the same shall be ordered, disposed and employed by the said William Robinson and J. A. Corbitt, trustees, for such uses and interests and purposes, and in such manner and form, as the said trustees may think proper, and it shall also be lawful for the said trustees, at any time from and after the said marriage shall take effect, to commence an action or suit at law or equity against any person or persons for recovering to the said Margaret Robinson, the said trustees doth promise and agree for themselves, their heirs and assigns, to do and execute all and every such further act or acts for the better settling, receiving the moneys, goods and estates of the said Margaret Robinson, declared for her separate use and benefit, provided also, and it is concluded and agreed by and between all the said parties to these presents, that the said trustees shall be indemnified and

saved harmless out of the said separate estate of the said Margaret Robinson, from all manner of costs, charges, damages or any trouble which they may sustain or incur for recovering any part of the estate of the said Margaret Robinson, or any other account whatever relating to the said separate estate."

The deed is signed and sealed by all the parties thereto, and in the presence of two attesting witnesses; and it was read over to the parties a few minutes before the ceremony, Sanderlin remarking at the time that he did not understand it, but would sign it, as he was not (157) marrying for money. The complainant, Margaret, at the time of her marriage, was about forty-five years of age, and was a woman of fair understanding, though of limited education. The deed in question was prepared by the direction of the brothers of complainant, Margaret, and was presented to her and Sanderlin for the first time just before the ceremony.

It was in evidence that a deed had been prepared at the request of Margaret, in which was reserved to her the right of disposing of her property, during coverture and afterwards, should she survive, and this being unsatisfactory to the brothers, they had the one in question prepared as above recited.

There was much testimony taken, but in view of the case taken by the Court, the Reporter deems it unnecessary to set it out. The bill is filed to have the marriage articles reformed and corrected, so as to settle and secure the real and personal estate of complainant, Margaret, to her sole and separate use, with power to dispose of the same at any time in such manner as she may think proper, and for general relief.

The cause being set for hearing upon bill, answers, exhibits and proofs, was sent to this Court by consent.

W. A. Wright, for the plaintiffs.
Person and *Strange,* for the defendants.

BATTLE, J. The bill is filed for the purpose of having a marriage contract, alleged to have been executed by the plaintiffs upon a misapprehension and mistake of its terms, corrected, and a settlement made in conformity with the real intention of the parties. There are some allegations of fraud and undue influence exercised over the *feme* plaintiff, which are not sustained by any competent testimony, and which we shall, therefore, dismiss from our consideration. Indeed, it is hardly necessary for us to notice the extrinsic testimony in relation to the execution of the contract at all, except merely to say that it tends to support the inference, which the law draws from the terms of the contract

itself, that they are, *per se,* a fraud upon the rights of the *feme* (158) plaintiff, and must be relieved against in this Court.

The property which the parties intended to settle by the instrument which they executed, belonged, before the marriage, exclusively to the woman. By the contract, she is made to give up her right to dispose of it, by deed or otherwise, not only during coverture, but even after the death of the husband, in the event of her surviving him. More than this, she renounces the privilege of receiving and disposing of the rents and profits of the estate during the coverture, the instrument providing that they shall be "ordered, disposed and employed by the trustees for such uses, interests and purposes, and in such manner and form, as the said trustees may think proper." As a final disposition of the estate, it is, after a life estate reserved to her, limited, "in default of her issue, to return to her present heirs before marriage." The provision in favor of her issue could hardly have been expected to amount to much, when it was remembered that she had arrived at the age at which women, ordinarily, cease to have offspring. The case, then, presents this singular result, that a woman of the mature age of forty-six, having a comfortable estate in land and slaves, is, for the privilege of getting married, induced by her brothers to enter into a contract, by which her intended husband is deprived not only of any benefit to be derived from her property during coverture, but of every possibility of getting it, or any part of it, after her death, should he be the survivor; she submits to have her fee simple estate in the lands, and her absolute estate in the slaves, cut down to a life estate; her power of disposing of the property is taken away, both during and after coverture, and even the rents and profits are to be expended by the trustees as they may think proper; and it is substantially limited after her death to persons who are her relations, indeed, but entire strangers to the consideration upon which the contract was founded.

Such a contract, unless proved by the clearest testimony to have been fully understood and freely assented to by the intended wife, must be declared to be fraudulent as to her. In laying down this (159) proposition, we are fully sustained by the decision of this Court in *Scott v. Duncan,* 16 N. C., 403. There, a settlement, and not a mere contract for a settlement, was made, in which the estates were settled to the use of the husband and wife for their joint lives, but not subject to his debts or disposal; and if she survived, to her for life; and upon her death, without issue living, over to her two sisters and their children. RUFFIN, J., who delivered the opinion of the Court, made some remarks so applicable to the case before us, that we can not do better than quote his language:

"A most important circumstance presents itself to our consideration

upon first opening this case. The deed is an absolute and irrevocable disposition of the property, although made by a person who was not likely to have issue. That an absolute settlement should be made on the children of the marriage, would not surprise us. We should expect that the husband would require it, and not leave it to the wife, without his consent, or that of the trustee, to appoint it away to strangers, or to the issue of another marriage. But here, issue, though mentioned in the deed, could hardly have been anticipated by a lady of fifty years of age. In such a case, the want of a power of revocation and reappointment astonishes. It is against the proneness of the human heart to retain the dominion over property. But if we are surprised at finding no such power reserved to the wife during the coverture, how much more must we be struck when we come to see that although the deed contemplates her surviving the husband, yet, in that event also, her hands are perfectly tied. Her estate does not become her own again, though her necessities may require a sale. She is not even allowed to devise it among her own relations. This deed fixes, by irreversible doom, the course of the lady's estate, against her own necessary use of it, and power of reasonable disposition after discoverture; and this, not as against her own children, but as to collaterals, who are strangers to the consideration upon
(160) which it was made. It is impossible for a Court of justice to say that any extrinsic evidence—anything out of the deed itself—could entirely remove the suspicion of fraud, or of mistake, arising from gross ignorance in the parties, which these strange omissions create. Nothing but imposition, or taking advantage of a fatuous confidence, could bring to the point of actual execution such an instrument. Upon the face of the deed, it is fraudulent."

If there were any words of conveyance in the instrument now before us, by which the property of the wife was conveyed to the trustees, the case would be almost identical with *Scott v. Duncan, supra,* in the facts, as it is entirely so in the principle; for it is evident that the principle must be the same, so far as the instrument may be affected by fraud or mistake, whether it be an actual settlement or a mere contract for one. In either case, the Court of Equity has jurisdiction to reform it, by directing the execution of a deed of settlement in accordance with the proved or admitted intention of the parties. It may not be improper to notice here, that the bill treats the present instrument as a mere contract for a settlement, and not an actual settlement, as seemed to be supposed by the counsel for the defendant in his argument before us.

We have already remarked that the extrinsic evidence, so far from rebutting the legal inference of fraud or mistake arising from the instrument itself, tends to confirm it. A part of that evidence is, that the instrument in question was read over to the intended husband and wife,

and was executed by them, just before the marriage ceremony was performed. Upon that circumstance, an argument is founded that if the parties to the marriage knew the contents of the instrument, and mistook its legal effect, they can not have relief; as there is a well established distinction between a mistake as to a matter of fact, and one as to a matter of law. The case of *Scott v. Duncan,* to which we have already alluded, affords us the following satisfactory reply to a similar objection: "But it is, then, a reliance that the deed was read over to her; and it is argued that a mistake of its legal operation could (161) not be averred. It is clear that where the parties are perfectly aware of the actual contents of the deed, and each, acting on his own judgment, or that of his counsel, omits to insert a clause, for fear it may affect the deed in law, they can not be helped. But here the question is one of imposition and abuse of confidence. The very enquiry is, whether she did, in fact, know and understand what was in the deed and what was not. It was read to her, it is true; but what a time to produce a complicated marriage settlement to an uninstructed female, dressed for her marriage! Was it read to her in the hope that she would or would not understand it? To whom could she apply for advice, but to the very person who had contrived the imposition on her. I wonder that she had not signed and sealed without a question." These remarks are almost as pertinent and applicable to the facts of case before us, as to that wherein they were made. Our conclusion, then, is that the *feme* plaintiff is clearly entitled to relief against the contract, which she was induced to execute in contemplation of her marriage. We are equally clear that the husband is also entitled to have the settlement which must be decreed, so arranged as to leave him the chance of having the slaves and other personal property, appointed for his use by a will or an instrument in the nature of a will, executed by his wife during her coverture. The husband was probably as much ignorant of the contents of the instrument which he executed as was his wife. But even supposing that he knew its contents, he was called upon to execute it under such circumstances as to make it inoperative against him, except so far as we can infer that he freely assented to it. A settlement by which the intended wife's property was to be so settled to her sole and separate use as to keep it free from the intended husband's debts and incumbrances during the coverture, was certainly in the contemplation of the parties, and to that intent he is bound by his contract, but we can not believe that he freely excluded himself from any benefit, or possibility of benefit, from her property, not only during the coverture, but even after it, although he might be the survivor; (162) see *Taylor v. Rickman,* 45 N. C., 28.

The proper decree, if drawn in accordance with the principle of our

decision, will be, that the property, real and personal, mentioned in the marriage contract referred to in the pleadings, shall be conveyed to some suitable person, as trustee, in fee as to the land, and absolutely as to the slaves and other chattels, in trust for the sole and separate use of the wife during coverture, and if she should survive her husband, then in trust for her in fee of the land, and absolutely of the personalty; but if she should die without issue, during coverture, then to her heirs-at-law and next of kin, exclusive of her husband, with a power of revocation and appointment by a will, or by a paper-writing, properly attested by two credible witnesses, in the nature of a will, executed during coverture, in case she died during the lifetime of her husband. Such a settlement will give to the wife as much control over her estate as she can be allowed to exercise, without being liable to the improper influence of her husband; and will restore to her the complete ownership, in the event of her surviving him. It will give effect to the disposition contained in the contract of settlement in favor of those whom she therein calls "her present heirs before marriage," in case of her dying without issue during the coverture, unless she chooses to dispose of it to her husband or to some other person, by the exercise of the power of revocation and appointment, reserved to her to be exercised during coverture, by means of a will or a paper-writing in the nature of a will. The plaintiffs are entitled to their costs against the defendants Daniel and William Robinson, and must pay costs to the defendant Corbitt. The other defendants must pay their own costs.

PER CURIAM. Decree accordingly.

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(163)

CHARLOTTE C. SCALES, Executrix, against PETER SCALES and others.

1. Courts of equity will not anticipate and decide questions which can not be attended with any present practical results.
2. Where a testator bequeathed certain of his property, specifically, and then provided, "the balance of my estate to be sold and the proceeds divided among my children hereinafter named," it was *Held*, that the bonds, notes and accounts due the testator, and the cash on hand, were not embraced in this clause.
3. A legacy to a granddaughter, who died before the will was made, is void.

CAUSE removed from the Court of Equity of ROCKINGHAM.

The bill is filed by Charlotte Scales, the executrix of the last will and testament of James Scales, deceased, and prays the aid of the Court in construing the said will, which is as follows:

"First. I give unto my beloved wife, Charlotte C. Scales, the tract of land whereon I now live, containing eight hundred and five acres,

for and during her natural life, or so long as she may continue a widow, but in case she marries again, to have one-third part thereof; also, I lend her the following negroes during her life, to wit, Daniel, Smith, John, Leathy, Aggy, America, and each of their youngest children, Mitchell, Pinckney, Henry and Granville, three head of horses, four cows and calves, six beef cattle, twenty head of hogs," etc., * * * "and after the death of my wife, I give the said tract of land to my three youngest children, Elizabeth, Susan and Nicholas Dalton, to be equally divided between them.

"2d. I give to my sons Peter and Hamilton Scales the tract of land Peter now lives on.

"Item 3d. I give to my son Peter Scales three negroes, Martha, Charles and York.

"Item 4th. I give to my son James Scales, two negroes, Peggy and Sabry, and four hundred dollars.

"Item 5th. I give to my son Hamilton Scales, three negroes, Joseph (Jr.), Frank and Alexander.

"Item 6th. I give to my son Rawley Scales, three negroes, Burch, Biddy and Sam."

In the succeeding clauses of the will, the testator gives a number of specific legacies to slaves, and several pecuniary legacies. (164) The thirteenth item is as follows: "I give to my two granddaughters, Mary Ellington and Lucy V. Irwin, one hundred and fifty dollars each. The will then concludes as follows: "My will and desire is that the balance of my estate not disposed of, be sold, and the money equally divided between my children hereinafter named, to wit, Peter, James, Hamilton, Robert, Rawley, Elizabeth, Nicholas D. and Susan, after deducting as much as will pay for a tombstone for my grave, containing my name and age; also, the negroes and other property loaned to my wife during her life, after her death, be sold, and the money equally divided between all my children, agreeable to law; and lastly, I constitute and appoint my beloved wife, Charlotte C. Scales, my executrix of this my last will and testament."

The bill prays to be instructed: Firstly, whether the plaintiff, Charlotte C. Scales, takes absolutely the horses, cows and calves, beef cattle, hogs, money, etc., given her in the first item of the will, or whether she takes only a life estate, and if the latter, then how far she may become responsible for such as shall be consumed or lessened in value by the use.

Secondly. Do the bonds, notes and accounts due the testator, and the cash on hand, fall into the residuary fund created by the last clause of the will? or did the testator die intestate as to them?

Thirdly. The bill sets out that Mary Ellington, to whom the testator bequeathed a pecuniary legacy of one hundred and fifty dollars, by the

thirteenth clause of his will, died before said will was made, leaving several children surviving her, and it prays the advice of the Court whether this legacy vested in her children, as the representatives of their deceased parent, or did the testator die intestate as to this fund? or does it fall into the residuum created by the last clause of the will?

Fourthly. The bill alleges that, at the making of the will, the testator had only one slave named Alexander, a child of the woman Aggy, then about eighteen months old; by the fifth clause of the will, the
(165) testator gives to his son Hamilton, slaves, Joseph (Jr.), Frank and Alexander; by the first clause he gives to his wife, for life, woman slave, Aggy, and her youngest child. At the time the will was made, this child, Alexander, was Aggy's youngest child, though she had another, born between the making of the will and the testator's death. To whom does Alexander belong?

Fifthly. The bill further shows that, at the death of the testator, there was a crop growing on the land devised to the plaintiff, and that she kept some of the negroes specifically bequeathed to herself and to the testator's children, on the land, in order to mature the crop; that this crop, when so matured, passes into the residuum, in which she and some of the children, whose slaves she employed, have no interest. Are they entitled to an allowance for the hires of the slaves employed in cultivating the crop?

The cause being set for hearing upon bill, answer and exhibits, was sent to this Court by consent.

No counsel appeared for the plaintiff in this Court.
Morehead, McLean and *Gorrell,* for defendants.

BATTLE, J. The bill is filed by the executrix of James Scales, deceased, for the purpose of obtaining the advice of this Court as to the construction of the will of her testator, in several specified particulars.

1. The executrix wishes to know whether she has an absolute interest or only a life estate in certain property of a perishable kind, and if the latter, how far she may be responsible for its consumption in the use; and also, how the proceeds of the slaves, given to her for life, and then to be sold, are to be divided. Those are questions which will arise after her death, and she has no interest in having them decided now. We have often said that we will not anticipate and decide questions which can not be attended with any present practical results.

2. The residuary clause of the will does not include the money on hand, or that due on bonds, notes and accounts, because it can not be presumed that the testator intended them to "be sold." *Pippin v.*
(166) *Ellison,* 34 N. C., 61, is a direct authority upon this question. This fund is, therefore, undisposed of by the will, and must, after

the payment of debts and the pecuniary legacies, for which it is primarily liable, be divided amongst the testator's next of kin, according to the statute of distributions. The residuary clause, however, imposes the expense of procuring a tombstone for the testator, upon the proceeds of the property therein directed to be sold.

3. The legacy of the granddaughter, Mary Ellington, who died before the testator's will was made, was void, and did not become vested in her children, because there was no person in existence to answer the description contained in the will at the time when it was made, or at any other time during the life of the testator. The Revised Code, ch. 119, sec. 28, differs from the Revised Statutes, ch. 122, sec. 15, in using the words "child or other issue," instead of child or children, which would include a grandchild, if such were living and capable of being a legatee at the publication of the will, but we think it can not embrace one then dead. The statute was intended to apply to a *lapsed,* and not a void, legacy. This legacy being void, does not pass under the residuary clause, for the reason given in the answer to the next preceding question, but is distributable among the next of kin.

4. The slave Alexander does not pass to the widow, because, at the death of the testator, when the will speaks, he was not his mother's youngest child; but he does pass to the testator's youngest son, Hamilton, because he answers the description given in the will in every particular, and there is no room for extrinsic proof, because there is no latent ambiguity. The youngest child of Aggy will, of course, belong to the widow for life.

5. The owners of the several slaves who were employed in the cultivation of the crop, will be entitled, respectively, to their hires. For this, see *Harrell v. Davenport,* 58 N. C., 4.

PER CURIAM. Decree accordingly.

Cited: Hastings v. Earp, 62 N. C., 6; *Hogan v. Hogan,* 63 N. C., 225; *Gordon v. Pendleton,* 84 N. C., 100; *Twitty v. Martin,* 90 N. C., 647; *Vaughan v. Murfreesboro,* 96 N. C., 320.

Dist.: Harkness v. Harkey, 91 N. C., 199.

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(167)

SIMON J. LATHAM and others against GILBERT L. MOORE and JOHN J. SHERROD.

Where one takes the note of the estate from an administrator, *mala fide,* as for instance, in payment of the administrator's own debt, he cannot hold the fund from the next of kin, or those who are entitled to be substituted in their place, unless the administrator was in advance for the estate.

CAUSE removed from the Court of Equity of MARTIN.

The defendant Gilbert L. Moore, as the administrator of one Daniel Ward, sold lands belonging to the estate to one E. W. Cox, who gave his note for the purchase money, amounting to $2,500, dated 8 October, 1857. During the lifetime of Daniel Ward, the intestate of defendant Moore, the defendant Sherrod held his notes to the amount of $1,300, and Gilbert L. Moore was also indebted to him, Sherrod, in the sum of $700, and at the request of Moore, who had qualified as the administrator of Ward, Sherrod assigned to him the said notes against the intestate, and, in consideration of such assignment, and of his own indebtedness, Moore gave his bond, payable to Sherrod, for two thousand dollars, with Friley W. Moore as surety, dated 1 January, 1855, and bearing interest from date. Afterwards, at the request of Moore, Sherrod took from him the note on E. W. Cox, which, with interest accrued, amounted to $2,534.58, and, in payment therefor, gave him $200 in cash, a note on Colin E. Spruill for $859.20, and gave credit on the $2,000 note of Gilbert Moore and Friley W. Moore for the residue of the $2,534.58, viz., $1,475.

Ward, in his lifetime, was the guardian of the minor children of one Powell, and a judgment for the sum of $1,380.48 was recovered against Gilbert Moore, as administrator of said Ward, and also against the sureties on his, Ward's guardian bond, at April Term, 1857, of Martin County Court, for money due the minor children. The bill is filed by the sureties upon Ward's guardian bond and the sureties upon the administration bond of the defendant Gilbert L. Moore, and alleges that he, Moore, has wasted the assets of the intestate's estate to a large amount, and is now insolvent, having made an assignment of all
(168) his property for the benefit of certain of his creditors; that creditors of the estate have obtained judgments against the administrator to a large amount, and have sued out writes of *scire facias* to get judgment against him individually; and that, as a consequence, the sureties upon his administration bond will have to pay the debts, to the amount of the assets so wasted.

The prayer of the bill is to have a receiver appointed to take into possession all the estate of Daniel Ward that can be found, and apply the proceeds, under the direction of the Court, to the payment of debts, and that the defendant John J. Sherrod be ordered to surrender the note on E. W. Cox, to be applied as part of the assets of the estate; also, for an injunction to restrain him from parting with the possession of it.

Friley W. Moore, mentioned above as the surety on the bond for $2,000 given by the defendant Gilbert L. Moore to the defendant Sherrod, is also one of the sureties on the administration bond of Gilbert L. Moore, and is one of the plaintiffs to this bill. Defendant Sherrod

filed a cross-bill against him, setting out the above recited facts, and also, that Friley W. Moore, as surety, had paid him the balance due on the $2,000 note, a judgment having been obtained for the same in the County Court, and it claims that Sherrod, the plaintiff in this bill, is entitled to have the balance on the $2,000 note, which will remain unpaid if the credit was erroneous, set off against any sum to which the said Friley W. Moore may, by the decree of the Court, otherwise become entitled by reason of the purchase of the said note, and also, that Friley and Gilbert Moore ought to pay the plaintiff Sherrod the full amount of what he may be compelled to refund on account of the credit of $1,475.32 on the $2,000 note alleged in the original bill to have been erroneously given.

Sherrod admits in his answer to the original bill, and also in his cross-bill, that he was aware when he purchased the note in question that it was a part of Ward's estate, but alleges that Gilbert L. Moore was in advance of for advancements made for the benefit of the estate, and had, therefore, a right to reimburse himself out of the funds (169) of the estate. In order to ascertain the truth of this allegation, an account was ordered to be taken, from which it appeared that the administrator, Gilbert L. Moore, was in advance to the full amount of the credit of $1,475.32 on the $2,000-note of Gilbert and Friley Moore, less $113.06.

Upon the filing of the cross-bill and answer, the cause was set for hearing upon bills, answers, exhibits and proofs, and transferred to this Court by consent.

Winston, Jr., for the plaintiff.
Rodman, for the defendant.

PEARSON, C. J. An administrator has the right to sell or discount a note belonging to the estate, for the legal title is in him, and the exigency of the estate may make the conversion expedient. But when one takes a note of the estate from an administrator, *mala fide*, as, for instance, in payment of his own debt, so as to be a guilty participator in the abuse of power, he can not hold the fund from the next of kin, or those who are entitled to be substituted in their stead, unless the administrator could have resisted their claim on the ground that he was in advance of the estate, and consequently did not abuse his power, but had a right to apply the note to his own purposes by way of reimbursement; *Wilson v. Doster,* 42 N. C., 231, where the subject is fully discussed and the cases cited.

In respect to the cash payment $200, and the payment by means of Spruill's note, $859, the transaction does not come within the prohibition of the rule above stated. But in respect to the sum of $1,475, which was

entered as a credit on the note of the administrator, the prohibition does apply, unless the administrator was in advance for the estate, and for that reason had the right to use the funds of the estate for his reimbursement. In order to ascertain how this matter stood, an account was taken, by which it appears the administrator was in advance to the full amount of the credit, less the sum of $113.06. So, the ap-
(170) propriation was rightful except as to that amount, as to which the plaintiffs are entitled to a decree for a rateable part, except Friley Moore, whose claim is affected by an equity of the defendant Sherrod, which is set up in the cross-bill.

Among the vouchers of the administrator are "accounts paid," to the amount of $681.15, and it seems there are *notes* due by the intestate still unpaid to the amount of $1,576.52, and the question was suggested, whether, under these circumstances, he was entitled to claim the amount of the "accounts paid" as so much advanced for the estate. We can see no sufficient reason why he is not so entitled. The accounts paid are admitted to have been just debts due by the intestate. How far he has made himself liable to the note creditors by not giving to them the preference to which they are entitled in a due course of administration, over simple contract creditors, is not now the question; but simply, was he in advance for the estate, by having paid off debts of the estate? If so, he was entitled to reimburse himself by making an appropriation of the note in controversy; at all events, that fact is sufficient to repel the equity of the next of kin, or the plaintiffs who claim to be substituted in their stead to follow the fund in the hands of the defendant Sherrod.

The cross-bill was brought to a hearing with the original bill, and relieves the Court from any embarrassment as to the manner in which the decree should be modeled, so as to mete out justice to all the parties. Friley Moore was the surety of the administrator to the note on which the defendant Sherrod entered the credit. So, he has had the full benefit of it, and so far from having an equity to hold the defendant Sherrod responsible, the latter has a plain equity against him to recover so much of the $113.06 as is recovered of him by the other plaintiffs in the original case, for in effect he will have paid that amount on a note to which the said Friley Moore was surety, which being in his exoneration, falls under the well-settled doctrine of subrogation.

PER CURIAM. Decree accordingly.

(171)

L. L. CLEMENTS against HENRY MITCHELL and others.

1. Where one was a partner in a firm in 1855 and in 1857, but alleged that for 1856 he was not a partner, and that his withdrawal was evidenced by a deed which was lost, and it turned out that the deed had been destroyed by himself, and he answered delusively about it, and it appeared that he had acquiesced in certain acts of his partner, treating him as a partner, it was declared by the court that he was to be considered as a partner for the year 1856 also.
2. It was *Held*, by the court, that the destruction of the deed which it was admitted explained defendant's connection with the firm, and that, too, after he knew that it would be necessary to make such explanation, afforded a strong presumption that such deed committed him as a partner.

CAUSE removed from the Court of Equity of MARTIN.

In January, 1854, Joseph Waldo and L. L. Clements, the plaintiff, entered into a copartnership as merchants, in the town of Hamilton, under the name and style of "Waldo & Clements," and did business during the years 1855, 1856, and until March, 1857, when the co-partnership was dissolved, and all the effects of the firm were transferred to the plaintiff, Clements, to collect and pay debts, and adjust the balance between them.

During the year 1855, the defendant Waldo was in co-partnership with the defendant Henry Mitchell, in running a steam sawmill, and in shipping and selling lumber. During this year, the latter firm had considerable dealings with the firm of Waldo & Clements, and bought goods to a considerable amount, which was paid and settled. During 1856, the plaintiff alleges that the said firm of Waldo & Mitchell dealt still more largely, to wit, to the amount of....., and again in 1857. Waldo became insolvent, and in April, 1857, assigned, by deed, all his interest in the said mill, and all other partnership property, debts, etc., to the defendant Mitchell, to enable him to pay the debts of the concern. The plaintiff alleges that he has frequently called on the defendant Mitchell to pay to him the said debt due to the firm of Waldo & Clements, which he has refused to do. The prayer of the bill is for an account and settlement of the balance between these two firms.

Mitchell, in his answer, says that in January, 1856, he rented his interest in the steam sawmill to one William Parr for one (172) year, with the knowledge and consent of Waldo; that a part of this arrangement was, that the lumber on hand should be sold to pay the former debts of the co-partnership of Waldo & Mitchell, and that, therefore, for the year 1856 he was not a partner with Waldo, or any one else, in the said milling business; that this contract was expressed in writing, and deposited with one Daniels, who informed him that it is lost or destroyed.

Waldo, in his answer, says that it is true that Mitchell did agree in writing to let Parr take his place in the business of conducting the mill and lumber business, and whether the legal effect of the instrument was to release Mitchell from liability for the debts of the concern, he is not informed; but he says, "notwithstanding the said agreement, he was of opinion that the partnership of Waldo & Mitchell existed during the year 1856; that he therefore continued to sign the name of the firm, and Parr gave orders on the firm of Waldo & Clements in the name of Waldo & Mitchell; that advances were made by Waldo & Clements during that year on such orders and goods sold, which were charged to Waldo & Mitchell; and that he, Waldo, as a partner of the firm, signed a stated account admitting a balance due as set forth in the plaintiff's bill.

It appears from the evidence filed that during 1856, Mitchell was aware of the manner in which the entries were made in the books of Waldo & Clements, and though he objected to it, yet he afterwards acquiesced in it. It appears also in evidence that Mitchell himself, in 1857, destroyed the deed in question, and that he remarked to Parr when he did so, that it was of no further use and might as well be torn up. Also, that Mitchell was a man of financial means, and that Parr had been acting as engineer in the mill, and was without such means.

Reference was made to the Clerk and Master, who stated the account, charging Mitchell with the debts of the firm for 1856, to which
(173) he excepted, and the cause was heard in this Court on that exception.

B. F. Moore and *Donnell,* for the plaintiff.
Winston, Jr., and *Rodman,* for the defendants.

PEARSON, C. J. The exception of the defendant Mitchell, now heard, is based upon the allegation that he was not a partner of Waldo during the year 1856. This allegation is not proved, and, consequently, the exception must be overruled.

Mitchell admits his co-partnership with Waldo in 1855, and also in 1857, but alleges there was a discontinuance of the co-partnership for the year 1856 by the substitution of Parr in his stead for that year, which he insists resulted by the force and effect of a certain instrument of writing or deed executed by Parr and himself, with the knowledge and concurrence of Waldo.

This deed was destroyed by Mitchell in 1857, and he remarked to Parr at the time "that it was of no further use, and might as well be torn up." No copy of it was preserved, and the testimony in respect to it is so conflicting and of such a character as to render it impossible for the Court to declare what were its contents. We are fully satisfied, however, of this fact, that although the nature of the deed may have

been such as to have the legal effect to bring Parr *in* and make him liable, it did not have the effect to put Mitchell *out* of the firm, and relieve him from liability—the original purpose of the arrangement being to make Parr more stirring in his superintendence of the mills by having his wages depending, in part, on the profits.

Without entering into a particular examination of the evidence, one or two general remarks will be sufficient to show the correctness of this conclusion:

The want of fairness in the answer of Mitchell, by which he attempts to make the impression that the deed had been "lost or de-
destroyed" without any agency on his part, when it is proved
that he had, but a few months before, actually destroyed it him- (174)
self, raises a presumption against him, under which he must be
content to labor. Waldo had failed at the time when Mitchell tore up the paper; so he must have been aware that it was very important for him to be able to relieve himself from liability as a member of the firm, and if the deed had been of the character which he now pretends it was, he would most assuredly have preserved it. The fact that he tore up the deed, saying "it was of no further use," is entitled to more weight than the recollection of a half a dozen witnesses as to the contents of a paper in which they had no particular interest, and which it is not alleged contained any direct words releasing Mitchell and substituting Parr as a member of the firm.

Parr was only a workman, and had no means; Mitchell was a man of substance. If the deed was of the character now imputed to it, can it be seriously insisted that Waldo would not have objected to the arrangement by which a solvent partner was to be withdrawn and a man of straw put in his place? Besides, the firm of Waldo & Mitchell, in the year 1855, had been doing a very heavy business; would this alleged change have taken place by which the firm of "Waldo & Mitchell" was dissolved without a settlement or some more definite provision for paying off the debts and dividing the profits than a mere understanding that the lumber on hand was to be applied to the discharge of debts due for the past year, unaccompanied by any statement of the amount of the debts, or the quantity of lumber?

Waldo, during 1856, made entries on the books of "Waldo & Clements," charging large sums to "Waldo & Mitchell," according to the course of dealing of 1855. These entries were seen by Mitchell from time to time, and although at first he made some objections, he finally acquiesced, and allowed the dealing and entries in the books of "Waldo & Clements" to stand, and be continued to be made against "Waldo & Mitchell," without the slightest notice taken of "poor Mr. Parr!" who is now, by dexterous shuffling, to be turned up as the partner of

(175) Waldo, and Clements is to lose his money on the suggestion that the charges ought to have been entered against "Waldo & Parr"!! a firm which never figured "in book or bill," and of which no man had ever heard until after the failure of Waldo, when Mitchell attempts to trump up Parr as the partner of Waldo, although prior to that event he had himself been content to hold the honor.

PER CURIAM. Exception overruled.

Cited: *S. c.*, 62 N. C., 171-2.

PEYTON S. HENRY, Adm'r, against WILLIAM H. ELLIOTT, Adm'r.

Where one, who had only a life estate in land, made a deed for a fee simple, and the deed contained a warranty in fee, and the vendee, knowing of the defect in the title, gave his notes for the purchase money, upon which judgments were obtained, it was *Held*, that a court of equity would not interfere by injunctive process to restrain the collection of any part of these judgments, but would leave the vendee to his action on the warranty, it appearing that the warrantor was solvent.

CAUSE removed from the Court of Equity of BERTIE.

Jordan D. Elliott, the defendant's intestate, was seized of an estate by the curtesy in a certain tract of land, the remainder of which was in his two children, Richard H. and Sarah Elliott. Jordan D. Elliott being so seized, made a deed to Richard R. Henry, the plaintiff's intestate, purporting to convey the fee simple estate in the land in question, and warranting the title for himself, his heirs, executors, etc. Richard R. Henry, the vendee, at the same time gave three notes for the purchase-money, amounting to five hundred and fifty dollars. The bill admits that Richard R. Henry, at the time of the purchase, was aware of the fact that the vendor, Elliott, had only an estate by the curtesy in the land in question, but avers that said Elliott, at the time of the sale, promised to procure a deed for the remainder from his children.

(176) This allegation was denied by the answer. The vendee, Henry, applied to the children of Jordan D. Elliott to convey him the title to the remainder, which they refused to do. After such refusal to convey, the defendant William H. Elliott, as administrator of Jordan D. Elliott, who had died in the meantime, presented the notes in question and demanded payment, one of which was paid by Richard R. Henry, but he refused to pay the others, whereupon suit was brought upon them against him, and revived after his death against the present plaintiff, and judgment obtained in the Superior Court of Bertie County, and execution issued thereon. This bill is filed against William H. Elliott,

the administrator of Jordan D. Elliott, and seeks to obtain an injunction to restrain the collection of the judgment on these two notes, on the ground of a part failure of consideration.

The bill admits that at the time these notes were given, Richard R. Henry relied on the covenant of warranty in the deed to secure him from loss. And there was no allegation that the estate of Jordan D. Elliott was not sufficient to pay all damages which might have been sustained by reason of the breach of the covenant of warranty.

Upon the coming in of the answer, the injunction which had been granted in this cause was continued to the hearing, and the cause being set down for hearing, was transferred to this Court by consent.

Winston, Jr., for the plaintiff.
Garrett, for the defendant.

BATTLE, J. The plaintiff, admitting in his bill that his intestate, when he purchased the land in question, knew that the defendant's intestate had but a life-estate as tenant by the curtesy in it, puts his claim to relief in this Court upon the alleged ground that the vendor promised to procure from his two children, who were the owners of the remainder in fee in the land, deeds to the vendee for such remainder. This allegation is not admitted by the answers, and there is no proof in support of it, so that the defendant contends that the bill must be dismissed for the defect in the proof of a material allegation. (177)

But the plaintiff insists that, as there was a partial failure of the consideration, he can not, in equity and good conscience, be required to pay the full price of the land. Supposing that there was no objection to his recovery, because of the variance between his *allegata et probata,* there is a decisive objection to his claim; it is, that he admits that his intestate, when he purchased the land, relied upon the vendor's warranty as a security for the amount paid, until the alleged verbal agreement of the vendor to perfect the title should be complied with; and there is no pretense that the intestate's estate is not fully sufficient to answer all the damages which he can recover in an action on the covenant of warranty. He had then a full remedy at law; and he has it still, unless by his own act of purchasing the outstanding title he has deprived himself of it. *Hauser v. Mann,* 5 N. C., 411, and *Richardson v. Williams,* 56 N. C., 116, cited and relied on by the plaintiff's counsel, were decided mainly upon the ground that the defendants, who were non-residents of this State, and had no property here out of which a recovery at law could be made effective, ought to be enjoined, in equity, from the recovery of a debt or damages which could not be recovered back at law, except by means of a suit in another State. The principle of such cases is, that our Court of Equity will give redress where, other-

wise, the party seeking it would be driven into the Courts of another State for the purpose of obtaining it. The other case of *Jones v. Edwards,* 57 N. C., 257, was simply an order for continuing an injunction until the hearing, on account of the evasiveness of the defendant's answer. Neither case affords any support for the argument that the Court of Equity ought to interfere in behalf of a person, who has a plain and adequate remedy at law in our courts; particularly when he had that remedy in contemplation, and relied upon it when he entered into the engagement out of which the controversy arises.

PER CURIAM. Bill dismissed with costs.